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1280

No. 3604

1281

United States
1 1281
Circuit Court of Appeals

For the Ninth Circuit.

JOHN KOPPITZ,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District
Court of the Territory of Alaska, Third
Division.

FILED

JAN 13 1921

F. D. MONCKTON,
CLERK.

United States
Circuit Court of Appeals
For the Ninth Circuit.

JOHN KOPPITZ,

Plaintiff in Error,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

WILLIAM A. MUNLY, U. S. Attorney, Valdez,
Alaska,

For Plaintiff,

E. E. RITCHIE, Valdez, Alaska, **B. O. GRAHAM**,
Cordova, Alaska,

For Defendant.

In the United States Commissioner's Court, for the
Territory of Alaska, Third Division, Cordova
Precinct, at Cordova.

No. 680.

UNITED STATES OF AMERICA

vs.

JOHN KOPPITZ.

Complaint for Violation of Alaska Bone Dry Law.

SECTION ———.

John Koppitz is accused by Wm. L. Fursman in this complaint of the crime of violating the Alaska Bone Dry Law, an Act entitled "An Act to prohibit the manufacture or sale of alcoholic liquors in the Territory of Alaska and for other purposes," committed as follows, to wit:

The said John Koppitz, in the Territory of Alaska, and within the jurisdiction of this court, did, wilfully and unlawfully, on the 31st day of May, 1920, at Cordova, Alaska, be found drunk on the public streets, to wit, in said town of Cordova, contrary to the form of the statute in such case made and pro-

vided and against the peace and dignity of the United States of America.

WM. L. FURSMAN.

United States of America,
Territory of Alaska,—ss.

I, Wm. L. Fursman, being first duly sworn, depose and say that the foregoing complaint is true.

WM. L. FURSMAN.

Subscribed and sworn to before me this 31st day of May, 1920.

[Seal]

R. H. L. NOAKS,

U. S. Commissioner and Ex-Officio Justice of the Peace, at Cordova, Alaska.

Plea—"Not Guilty."

Fined \$250.00 and costs.

Filed in the District Court, Territory of Alaska, Third Division. Jun. 7, 1920. Arthur Lang, Clerk.
By C. H. Wilcox, Deputy. [1*]

In the U. S. Commissioner's Court for the Territory of Alaska, Third Division, Cordova Precinct, at Cordova.

No. 680.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN KOPPITZ,

Defendant.

*Page-number appearing at foot of page of original certified Transcript of Record.

Notice of Appeal.

To the United States of America, the Above-named Plaintiff, the Hon. WM. A. MUNLY, U. S. Attorney for said Territory and Division, and WM. L. FURSMAN, Private Prosecutor in the Above-entitled Action:

You will please take notice that John Koppitz, the above-named defendant, appeals from the decision and judgment given by Hon. R. H. L. Noaks, U. S. Commissioner and Ex-officio Justice of the Peace for the Cordova Precinct, Third Division, Territory of Alaska, in the above-entitled action on June 2, 1920, said action for which said defendant was tried, on his plea of Not Guilty, by the court without a jury on June 2, 1920, being a criminal complaint signed by Wm. L. Fursman, as private prosecutor, charging the said defendant with the crime of violating the "Alaska Bone Dry Law," which is an act entitled "To prohibit the manufacture or sale of alcoholic liquors in the Territory of Alaska, and for other purposes," enacted by the United States Congress and approved February 14, 1917, and that on said trial the said defendant was found guilty by the said U. S. Commissioner and ex-officio justice of the peace, and upon said conviction it was ordered and adjudged by the said U. S. Commissioner and ex-officio justice of the peace that the said John Koppitz be fined the sum of Two Hundred and Fifty (\$250.00) Dollars, and costs of the action taxed at \$25.05, or be imprisoned in the Federal Jail not exceeding one hundred and twenty-five days.

Dated at Cordova, Alaska, this 2d day of June, 1920.

JOHN KOPPITZ,
Defendant.

Service of a true and correct copy of the foregoing Notice of Appeal is hereby acknowledged at Cordova, Alaska, this 2d day of June, 1920.

WM. L. FURSMAN.

Private Prosecutor in the Above-entitled Action.

Filed in the District Court, Territory of Alaska, Third Division. Jun. 7, 1920. Arthur Lang, Clerk. By C. H. Wilcox, Deputy. [2]

In the U. S. Commissioner's Court for the Territory of Alaska, Third Division, Cordova Precinct, at Cordova.

No. 680.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN KOPPITZ,

Defendant.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS: That John Koppitz, as principal, and George Dooley and Tony Lynch, as sureties, are held and firmly bound unto the United States of America in the full sum of Five Hundred (\$500) Dollars, for the payment of which, well and truly to be made, we bind

ourselves, our heirs, executors, administrators, jointly and severally, firmly by these presents.

Signed with our hands and sealed with our seals this second day of June, 1920.

The conditions of the above undertaking are such that, whereas, the said John Koppits was, on the second day of June, 1920, in the above-entitled action and in the above-entitled court, before the Hon. R. H. L. Noaks, U. S. Commissioner and ex-officio justice of the peace in and for the Cordova Precinct, Third Division, Territory of Alaska, duly convicted of the crime of violating the Alaska Bone Dry Law, by being drunk in the public streets, in violation of an act entitled "To prohibit the manufacture or sale of alcoholic liquors in the Territory of Alaska, and for other purposes," enacted by the Congress of the United States of America, and approved February 14, 1917, and upon said conviction it was ordered and adjudged by the said U. S. Commissioner and ex-officio justice of the peace, that the said John Koppitz be fined the sum of Two Hundred and Fifty (\$250.00) Dollars and costs of the action taxed at \$25.05, or be imprisoned in the Federal Jail not exceeding one hundred and twenty-five days.

WHEREAS, the said U. S. Commissioner and ex-officio justice of the peace on the second day of June, 1920, duly made and entered an order, admitting the said defendant to bail in the penal sum of Five Hundred (\$500.00) Dollars, pending an appeal to the District Court for the Territory of Alaska, Third Division; and

WHEREAS, the said John Koppitz is desirous of appealing and has filed proper notice of appeal from the decision and judgment of the said U. S. Commissioner and ex-officio justice of the peace, said notice having been served on the private prosecutor in the above-entitled action, to the District Court of the Territory of Alaska, Third Division.

NOW, THEREFORE, if the said John Koppitz fail to pay all the costs and disbursements that may be awarded against him on appeal, or shall fail to surrender himself in execution of judgment in case of conviction in the appellate court, or shall fail not to in all respects abide by and perform the orders of and judgments of the appellate court upon the appeal, we will pay to the United States of America the sum of Five Hundred (\$500.00) Dollars.

And should the said John Koppitz fully perform all the obligations required by this undertaking, then this obligation shall be void; otherwise it shall remain in full force and effect.

In Witness Whereof, we have hereunto set our hands and seals this 2d day of June, 1920.

JOHN KOPPITZ. (Seal)

GEORGE DOOLEY. (Seal)

TONY LYNCH. (Seal)

Filed in the District Court, Territory of Alaska, Third Division. Jun. 7, 1920. Arthur Lang, Clerk.
By C. H. Wilcox, Deputy. [3]

United States of America,
Territory of Alaska,—ss.

George Dooley and Tony Lynch, being first duly sworn each for himself, says: That he is a resident

of the Territory of Alaska, and the Third Judicial Division thereof; that he is not a counsellor or attorney at law, marshal or deputy marshal, commissioner, clerk of any court, or other officer of any court; that he is worth the sum specified in the foregoing undertaking and bond, over and above all his just debts and liabilities, and exclusive of property exempt from execution.

GEORGE DOOLEY.

TONY LYNCH.

Subscribed and sworn to before me this 2d day of June, 1920.

[Seal]

EDWARD F. MEDLEY,

Notary Public for Alaska.

My commission expires October 11, 1921.

Taken and acknowledged before me the day and year above written, and the appeal in the above-entitled action is hereby allowed, and bail bond approved and allowed.

[Seal]

R. H. L. NOAKS,

U. S. Commissioner and Ex-officio Justice of Peace,
Cordova Precinct, Third Division, Territory of
Alaska. [4]

In the United States Commissioner's Court for the
Territory of Alaska, Third Division, Cordova
Precinct, at Cordova.

No. 680.

UNITED STATES OF AMERICA

vs.

JOHN KOPPITZ,

Transcript from Commissioner's Court.

Violation Alaska Bone Dry Law.

May 31, 1920.

Complaint taken and filed charging John Koppitz with violating the Alaska Bone Dry Law, an act entitled "An Act to prohibit the manufacture or sale of alcoholic liquors in the Territory of Alaska, and for other purposes," complaint verified by Wm. L. Fursman. 1.15

Warrant of arrest issued and placed in hand of Wm. L. Fursman, Deputy U. S. Marshal. . . 1.50

Warrant of arrest returned and filed endorsed as follows: "The within writ came to hand May 31, 1920, I executed the same by arrest of the within named defendant and now produce him in court, F. R. Brenneman, U. S. Marshal. By Wm. L. Fursman, Deputy."50

June 2, 1920.

Subpoena for witnesses on behalf of plaintiff issued and placed in hand of Wm. L. Fursman, Dep. U. S. Marshal.75

Subpoena for witnesses on behalf of plaintiff returned and filed endorsed as follows: "I certify that I received the within subpoena on the 2d day of June, 1920, by reading the same and showing the original and delivering a copy thereof to George Stewart, the person named therein at Cordova, Alaska, F. R. Brenneman, United States Marshal. By Wm. L. Fursman, Deputy U. S. Marshal."50

The complaint and affidavit upon the warrant of arrest was issued was read to the de-

fendant,—the complaining witness being then and there—in court,—who entered a plea of “NOT GUILTY.”

The above-named defendant John Koppitz having been brought before me, R. H. L. Noaks, U. S. Commissioner and ex-officio justice of the peace, charged with violating the Alaska Bone Dry Law, and having pleaded “NOT GUILTY” to said charge, Wm. L. Fursman and Geo. Stewart were each sworn and testified on behalf of plaintiff, and thereafter defendant having no evidence to offer and the Court being fully advised in the law and the premises and by the Court found “GUILTY,” and nothing appearing why sentence should not be pronounced, it is hereby adjudged for the crime aforesaid said defendant John Koppitz be sentenced to pay a fine of \$250.00 and the costs of the action taxed at \$25.05 or be imprisoned in the Federal Jail not exceeding 125 days. 1.50

Taxing Costs	1.50
Issuing order in dup. to pay witnesses.....	.75
	<hr/>
	8.55

June 2, 1920.

Notice of appeal filed..... 15

Appeal bond with George Dooley and Tony Lynch as sureties taken, approved, acknowledged and filed..... 1.65

United States of America,
Territory of Alaska,—ss.

I, R. H. L. Noaks, U. S. Commissioner and ex-officio Justice of the Peace for the Territory of Alaska, Third Judicial Division, Cordova Precinct, at Cordova, DO HEREBY CERTIFY, that the above and foregoing is a full, true and correct copy and the whole thereof of the docket entries in the case of the United States vs. John Koppitz, No. 680, in my court.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at Cordova, Alaska, this 3d day of June, 1920.

R. H. L. NOAKS,
U. S. Commissioner and Ex-officio Justice of the Peace.

Filed in the District Court, Territory of Alaska, Third Division. Jun. 7, 1920. Arthur Lang, Clerk. By C. H. Wilcox, Deputy. [6]

In the District Court for the Territory of Alaska,
Third Division.

No. 797—CRIMINAL.

UNITED STATES OF AMERICA

vs.

JOHN KOPPITZ.

Judgment.

This matter coming on for hearing upon the mo-

tion filed herein by the United States Attorney for the dismissal of the appeal taken herein by the defendant from the judgment entered in the United States Commissioner's Court for the Cordova Precinct, at Cordova, on the 2d day of June, 1920, on the grounds that said notice of appeal filed by the defendant was void for the reason that the same did not describe and identify the judgment entered in said Commissioner's Court, or describe with particularity the crime for which defendant was convicted; and it appearing that the grounds for said motion to dismiss said appeal are good and sufficient and that said notice of appeal filed by the defendant is void; and it further appearing that a bond for costs on appeal in the sum of Five Hundred Dollars has been filed herein, wherein George Dooley and Tony Lynch are sureties; it is ordered that said appeal be and the same is hereby in all respects dismissed, and it is further ordered that the judgment entered in the Commissioner's Court for the Cordova Precinct, at Cordova, on the 2d day of June, 1920, be entered herein;

It is therefore further ordered that said defendant John Koppitz pay a fine of Two Hundred and Fifty Dollars, and that he be imprisoned one day for every \$2.00 of such fine as he shall fail or refuse to pay, said imprisonment not to exceed one hundred and twenty-five days.

And it is further ordered and adjudged that the United States of America do have and recover of said defendant John Koppitz, and George Dooley and Tony Lynch, the said sureties on his appeal bond,

the costs of this prosecution taxed in the sum of \$94.20 Dollars, and that execution issue for the same.

Done in open court this 29th day of October, 1920.

FRED M. BROWN,

District Judge.

Filed in the District Court, Territory of Alaska,
Third Division. Oct. 29, 1920. Arthur Lang, Clerk.
By C. H. Wilcox, Deputy.

Entered Court Journal No. 12, page No. 979. [7]

In the District Court for the Territory of Alaska,
Third Division.

No. 680.

UNITED STATES OF AMERICA

vs.

JOHN KOPPITZ,

Defendant.

Petition for Writ of Error.

Now comes the defendant, John Koppitz, and states that on October 29, 1920, the above-named court entered judgment herein in favor of the United States of America and against him, dismissing his appeal from a judgment rendered against him in Justice's Court, and further entering judgment and sentence against him ordering that he pay a fine of Two Hundred and Fifty Dollars and that he be imprisoned one day for every \$2 of such fine as he should fail or refuse to pay; in which judgment and in the proceedings had prior thereto in said cause certain errors were committed to the prejudice of

said defendant, all of which more fully appears from the assignment of errors filed with this petition.

Wherefore defendant prays that a writ of error may issue in his behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors so complained of, and that a transcript of the record and proceedings with all things concerning the same duly authenticated be sent to said United States Circuit Court of Appeals for the Ninth Circuit.

And defendant further prays that an order be made fixing the amount of a bail bond for a supersedeas of judgment and sentence pending proceedings in said appellate court.

B. O. GRAHAM and

E. E. RITCHIE,

Attorneys for Defendant.

Filed in the District Court, Territory of Alaska,
Third Division. Nov. 6, 1920. Arthur Lang, Clerk.
By C. H. Wilcox, Deputy. [8]

In the District Court for the Territory of Alaska,
Third Division.

No. 680.

UNITED STATES OF AMERICA

vs.

JOHN KOPPITZ,

Defendant.

Assignments of Error.

Now comes the defendant, John Koppitz, and makes the following assignments of error upon which he will rely in prosecution of the writ of error herein:

1.

The Court erred in entering judgment of dismissal of defendant's appeal from the judgment of the Justice's Court.

2.

The Court erred in entering judgment and sentence against defendant after dismissing defendant's appeal.

3.

The Court erred in entering any judgment against defendant based upon the complaint in the action.

WHEREFORE defendant, as plaintiff in error, prays that said judgment may be reversed, vacated and set aside, and the cause remanded to the District Court for such further proceedings as may, in the premises, seem proper.

B. O. GRAHAM and

E. E. RITCHIE,

Attorneys for Defendant and Plaintiff in Error.

Filed in the District Court, Territory of Alaska, Third Division. Nov. 6, 1920. Arthur Lang, Clerk. By C. H. Wilcox, Deputy. [9]

In the District Court for the Territory of Alaska,
Third Division.

No. 680.

UNITED STATES OF AMERICA

vs.

JOHN KOPPITZ,

Defendant.

**Order Allowing Writ of Error and Fixing Bail and
Cost Bond.**

On this day came John Koppitz by his attorneys, B. O. Graham and E. E. Ritchie, and filed herein and presented to the Court his petition for the allowance of a writ of error, together with an assignment of errors to be urged by him; praying also that a transcript of the record and proceedings in said cause with all things concerning the same be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and further that the amount of bail for supersedeas and of a cost bond be fixed by the Court. On consideration whereof, the Court allows the writ of error as prayed for.

It is further ordered that a bail bond for the appearance of defendant, on supersedeas and stay of sentence, be given on behalf of said defendant in the sum of Five Hundred Dollars; and a bond for costs on appeal in the sum of Two Hundred and Fifty Dollars, each in the form required by law, with sufficient sureties to be approved by the Judge of this court, and that upon the filing and approval of said bonds, judgment and sentence herein be stayed.

It is further ordered that the sureties upon said bonds may justify before Kelly G. Robertson, Commissioner of Cordova Precinct, in the above-named territory and division.

Dated November 6, 1920.

FRED M. BROWN,
Judge.

Filed in the District Court, Territory of Alaska,
Third Division. Nov. 6, 1920. Arthur Lang, Clerk.
By C. H. Wilcox, Deputy.

Entered Court Journal No. 13, page No. 14. [10]

In the District Court for the Territory of Alaska,
Third Division.

No. 797.

UNITED STATES OF AMERICA

vs.

JOHN KOPPITZ

Bail Bond.

A judgment having been given on the 29th day of October, 1920, whereby John Koppitz was condemned to pay a fine of Two Hundred and Fifty Dollars (\$250.00) and that he be imprisoned one day for every Two Dollars of said fine as he shall fail or refuse to pay, said imprisonment not to exceed one hundred and twenty-five (125) days, and he having appealed from said judgment and being duly admitted to bail in the sum of Five Hundred Dollars (\$500.00),—

We, George Dooley, a resident of the Town of Cordova, Territory of Alaska, hotel proprietor, and Tony Lynch, of the same place, dairyman, hereby undertake that the above-named John Koppitz shall in all respects abide and perform the orders and judgments of the Appellate Court upon the appeal, or, if he fail to do so in any particular, that we will pay to the United States the sum of Five Hundred Dollars (\$500.00).

Dated and signed at Cordova, Alaska, in the presence of K. G. Robinson, Esquire, United States Court Commissioner and ex-officio justice of the peace, this 8th day of November, 1920.

[K. G. Robinson—Seal—3d Div.]

GEORGE DOOLEY.

TONY LYNCH.

Taken and acknowledged before me the day and year first before written.

K. G. ROBINSON,
United States Court Commissioner and ex-Officio
Justice of the Peace for Territory of Alaska,
Third Division, Cordova Precinct.

Filed in the District Court, Territory of Alaska,
Third Division. Nov. 10, 1920. Arthur Lang,
Clerk. By C. H. Wilcox, Deputy. [11]

United States of America,
Territory of Alaska,—ss.

George Dooley and Tony Lynch, being first duly sworn, each for himself and not one for the other, deposes and says:

I am one of the sureties named in and who exe-

cuted the foregoing bond. I am a resident within the Territory of Alaska, and am worth the sum of Five Hundred Dollars (\$500.00), exclusive of property exempt from execution and over and above all just debts and liabilities. I am not a counsellor or attorney at law, commissioner, marshal, clerk of any court, or other officer of any court.

GEORGE DOOLEY.

TONY LYNCH.

Subscribed and sworn to before me this 8th day of November, A. D. 1920.

[K. G. Robinson—Seal—3d Div.]

K. G. ROBINSON,

United States Commissioner and ex-Officio Justice of the Peace for Territory of Alaska,
Third Division, Cordova Precinct.

Approved November 10th, 1920.

FRED. M. BROWN,

District Judge. [12]

In the District Court for the Territory of Alaska,
Third Division.

No. 797.

UNITED STATES OF AMERICA

vs.

JOHN KOPPITZ

Undertaking on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS,
That we, John Koppitz, as principal, and George

Dooley and Toney Lynch, as sureties, are held and firmly bound unto the United States of America, the plaintiff above named, in the sum of Two Hundred Fifty Dollars (\$250.00), to be paid to the United States of America, or its assigns, the payment of which sum, well and truly to be made, we bind ourselves and each of our heirs and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 4th day of November, A. D. 1920.

The condition of the above obligation is such that—

WHEREAS, the above-named defendant, John Koppitz, is about to sue out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment made and entered in the above-entitled court and cause on the 1st day of November, A. D. 1920:

NOW, THEREFORE, if the above-named defendant, John Koppitz, shall prosecute said writ of error to effect and answer all damages and costs that may be awarded against him if he shall fail to make said plea good, then this obligation shall be void; otherwise to be and remain in full force and effect.

JOHN KOPPITZ.

By E. E. RITCHIE,

B. O. GRAHAM,

EDWARD F. MEDLEY,

His Attorneys.

GEORGE DOOLEY,

TONY LYNCH,

His Sureties.

Filed in the District Court, Territory of Alaska,
Third Division. Nov. 10, 1920. Arthur Lang,
Clerk. By C. H. Wilcox, Deputy. [13]

United States of America,
Territory of Alaska,—ss.

George Dooley and Tony Lynch, being first duly
sworn, each for himself and not one for the other,
deposes and says:

That he is one of the sureties named in and who
executed the foregoing bond; that he is worth the sum
of Two Hundred and Fifty (\$250.00) exclusive of
property exempt from execution, and over and above
all just debts and liabilities; that he is a resident of
the Territory of Alaska, and of the Third Judicial
Division of said Territory, and is not an attorney
or counselor at law, marshal, commissioner, clerk of
any court or other officer of any court.

GEORGE DOOLEY.

TONY LYNCH.

Subscribed and sworn to before me this 8th day of
November, A. D. 1920.

[Seal]

B. O. GRAHAM,

Notary Public for the Territory of Alaska.

My commission expires April 24, 1922.

Approved November 10th, 1920.

FRED M. BROWN,

District Judge. [14]

In the District Court for the Territory of Alaska,
Third Division.

No. 797.

UNITED STATES OF AMERICA

vs.

JOHN KOPPITZ,

Defendant.

Writ of Error.

The President of the United States of America, to
the Judge of the District Court of the Territory
of Alaska, Third Division, GREETING:

Because, in the record and proceedings, as also in
the rendition of the judgment which is in said Dis-
trict Court before you, in a cause wherein the United
States of America is plaintiff and defendant in error
and John Koppitz is defendant and plaintiff in er-
ror, manifest error hath happened, to the great
damage of plaintiff in error, as by his assignments
of error is made to appear; we being willing that error,
if any hath been, shall be duly corrected and full and
speedy justice done to the parties in this behalf, do
command you, that under your seal you send the
records and proceedings aforesaid, with all things
concerning the same, to the Circuit Court of Appeals
of the Ninth Circuit, together with this writ, so that
you have the same in said Circuit Court of Appeals
in the city of San Francisco, State of California, on
the 10th day of December, 1920, that, said record and
proceedings being inspected, said Circuit Court of
Appeals may cause further to be done what of right

and according to the laws and customs of the United States and the Territory of Alaska ought to be done.

WITNESS, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, this 10th day of November, 1920.

ARTHUR LANG,
Clerk of the District Court, Territory of Alaska,
Third Division.

Writ allowed by

FRED M. BROWN,
Judge District Court, Territory of Alaska, Third
Division.

Filed in the District Court, Territory of Alaska,
Third Division. Aug. 10, 1920. Arthur Lang,
Clerk. By C. H. Wilcox, Deputy. [15]

Service of the foregoing writ of error by delivery
of a copy admitted, citation waived, and the appear-
ance of the United States in the Circuit Court of Ap-
peals is entered this 10th day of November, 1920.

WILLIAM A. MUNLY,
United States Attorney.

Entered Court Journal No. 13, page No. 25. [16]

In the District Court for the Territory of Alaska,
Third Division.

No. 797.

UNITED STATES OF AMERICA

vs.

JOHN KOPPITZ,

Defendant.

**Order Allowing, Settling and Certifying Bill of
Exceptions.**

A proposed bill of exceptions agreed upon in this cause by counsel for the parties respectively having been submitted to the Court and it appearing to the Court that said proposed bill of exceptions is in proper form and conforms to the truth:

IT IS ORDERED that the same is hereby approved, allowed and settled, and ordered filed as the bill of exceptions on writ of error herein and made a part of the record in the cause. Said bill of exceptions is made up as follows, to wit:

1. Complaint.
2. Notice of appeal from Justice Court.
3. Bond on appeal from Justice Court.
4. Transcript of record in Justice Court.
5. Judgment in District Court.
6. Petition for writ of error.
7. Assignments of error.
8. Order allowing writ of error.
9. Bail bond.
10. Undertaking for costs.
11. Writ of error with admission of service and waiver of citation.
12. This order allowing, settling and certifying bill of exceptions.

Done in open court this 22d day of November, 1920.

FRED M. BROWN,
Judge District Court.

[Indorsed]: Filed in the District Court, Territory of Alaska, Third Division. Nov. 22, 1920. Arthur Lang, Clerk. By C. H. Wilcox, Deputy. [17]

In the District Court for the Territory of Alaska,
Third Division.

No. 797—CRIMINAL.

UNITED STATES OF AMERICA

vs.

JOHN KOPPITZ.

**Certificate of Clerk U. S. District Court to Transcript
of Record.**

United States of America,
Territory of Alaska,—ss.

I, Arthur Lang, Clerk of the District Court for the Territory of Alaska, Third Division, do hereby certify that the hereto annexed seventeen pages, numbered from 1 to 17, inclusive, are a full, true and correct transcript of the records and files of the proceedings in the above-entitled cause, as the same appears on the records and files in my office; that the same is made in accordance with the praecipe of E. E. Ritchie, attorney for defendant, filed the 12th day of November, 1920.

I further certify that the foregoing transcript has been prepared, examined and certified to by me, and the cost thereof, amounting to \$7.85, was paid to me by E. E. Ritchie, Esq., attorney for the defendant and plaintiff in error herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of this Court at Valdez, Alaska, this 23d day of November, A. D. 1920.

[Seal] ARTHUR LANG,
Clerk of the District Court for the Territory of
Alaska, Third Division.

[Endorsed]: No. 3604. United States Circuit Court of Appeals for the Ninth Circuit. John Kopitz, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Territory of Alaska, Third Division.

Filed December 3, 1920.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

IN THE
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United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JOHN KOPPITZ,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

No. 3604

UPON WRIT OF ERROR TO THE DISTRICT
COURT FOR THE TERRITORY OF
ALASKA, THIRD DIVISION.

Brief for Plaintiff in Error

B. O. GRAHAM, Cordova, Alaska,
EDWARD F. SMEDLEY, Cordova, Alaska,
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Attorneys for Plaintiff in Error.

IN THE
United States
Circuit Court of Appeals
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JOHN KOPPITZ,
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No. 3604

UPON WRIT OF ERROR TO THE DISTRICT
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Brief for Plaintiff in Error

STATEMENT OF THE CASE.

Plaintiff in error was convicted in justice's court of a misdemeanor. He appealed to the district court and there on motion of the district attorney his appeal was dismissed upon the ground

that his notice of appeal was defective, and judgment was entered against him as in the lower court. From that judgment of the district court he prosecutes this writ of error. The complaint filed against him in justice's court reads as follows:

"John Koppitz is accused by William L. Fursman in this complaint of the crime of violating the Alaska Bone Dry Law, an Act entitled 'An Act to prohibit the manufacture or sale of alcoholic liquors in the Territory of Alaska and for other purposes,' committed as follows, to-wit:

The said John Koppitz, in the Territory of Alaska, and within the jurisdiction of this court, did, wilfully and unlawfully, on the 31st day of May, 1920, at Cordova, Alaska, be found drunk on the public streets, to-wit, in said town of Cordova, contrary to the form of statute in such case made and provided and against the peace and dignity of the United States of America." (R. 1-2.)

The judgment contained the following recital:

"The above-named defendant John Koppitz having been brought before me, R. H. L. Noaks, U. S. Commissioner and ex-officio justice of the peace, charged with violating the Alaska Bone Dry Law, and having pleaded NOT GUILTY to said charge, William L. Fursman and Geo. Stewart were each sworn and testified on behalf of plaintiff, and thereafter defendant having no evidence to offer and the court being fully advised in the law

and the premises and by the court found "GUILTY," and nothing appearing why sentence should not be pronounced, it is hereby adjudged for the crime aforesaid said defendant be sentenced to pay a fine of \$250 and the costs of the action taxed at \$25.05 or be imprisoned in the Federal jail not exceeding 125 days." (R. 9.)

The notice of appeal was addressed to the district attorney and private prosecutor by name and title, was served upon the private prosecutor, and further reads as follows:

"You will please take notice that John Koppitz, the above-named defendant, appeals from the decision and judgment given by Hon. R. H. L. Noaks, U. S. Commissioner and ex-officio Justice of the Peace for the Cordova Precinct, Third Division, Territory of Alaska, in the above-entitled action on June 2, 1920, said action for which said defendant was tried, on his plea of Not Guilty, by the court without a jury on June 2, 1920, being a criminal complaint signed by William L. Fursman, as private prosecutor, charging the said defendant with the crime of violating the 'Alaska Bone Dry Law,' which is an act entitled 'To prohibit the manufacture or sale of alcoholic liquors in the Territory of Alaska, and for other purposes,' enacted by the United States Congress and approved February 14, 1917, and that on said trial the said defendant was found guilty by the said U. S. Commissioner and ex-officio justice of the peace, and upon said conviction it was ordered and adjudged by the said U. S. Commissioner and ex-officio justice

of the peace that the said John Koppitz be fined the sum of Two Hundred and Fifty (\$250.00) Dollars, and costs of the action taxed at \$25.05, or be imprisoned in the Federal Jail not exceeding one hundred and twenty-five days." (R. 3.)

The district court dismissed the appeal on motion of the district attorney "on the grounds that said notice of appeal was void for the reason that the same did not describe and identify the judgment entered in said Commissioner's court, or describe with particularity the crime for which defendant was convicted." (R. 11.)

The judgment and order of the district court "further ordered that the judgment entered in the Commissioner's court for Cordova precinct be entered herein," and that defendant pay a fine of \$250 and be imprisoned one day for each \$2 of the fine that he might fail or refuse to pay. (R. 11.)

ASSIGNMENTS OF ERROR.

1. The Court erred in entering judgment of dismissal of defendant's appeal from the judgment of the Justice court.

2. The Court erred in entering judgment and sentence against defendant after dismissing defendant's appeal.

3. The Court erred in entering any judgment against defendant based upon the complaint in the action.

ARGUMENT.

I.

THE COURT ERRED IN DISMISSING DEFENDANT'S APPEAL.

It will be observed that the order and judgment of dismissal upon the ground that the notice of appeal failed to identify the judgment with particularity does not specify wherein the notice was defective. Inasmuch as the notice contains everything recited in the judgment except the names of the witnesses, and further recites "with particularity" sundry proceedings not specified in the judgment, counsel for plaintiff in error respectfully submit without further argument that the notice of appeal does fully identify the judgment and meets every requirement of a notice laid down in the Oregon decisions construing the statute of which the Alaska provision is a transcript, and is fully upheld by the rule laid down in *Neppach v. Jordan*, 10 P. 341:

"A judgment is sufficiently described when the court in which it is rendered is given, the

names of the parties to the judgment, the date of the judgment, and for what it was rendered."

II.

THE COURT ERRED IN ENTERING JUDGMENT AND SENTENCE AGAINST DEFENDANT AFTER DISMISSING THE APPEAL.

The judgment of dismissal states that "the notice of appeal is void." The case, therefore, was dismissed for want of jurisdiction. The defendant never came within the jurisdiction of the district court. How then could the court render any judgment against him? It is true that the judgment was based upon section 2559 Alaska Code (Carter's Code, sec. 450), which provides "That when an appeal is dismissed the appellate court must give judgment as it was given in the court below," but the Oregon supreme court has passed on the same provision in the Oregon Code five times and in each instance has held without assigning reasons that the appellate court has no power to act further than to dismiss. In *Whipple v. Southern Pacific R. Co.*, 55 P. 975, the court said:

"The circuit court properly dismissed the appeal, but, having proceeded further, and rendered judgment as in the justice court this was error. *Fassman v. Baumgartner*, 3 Or.

469; *Long v. Sharp*, 5 Or. 438; *State v. McKinnon*, 8 Or. 485; *Neppach v. Jordan*, 13 Or. 246, 10 P. 341. The judgment will therefore be reversed and the cause remanded with instructions to dismiss the appeal."

In *Cartier v. United States*, 148 F. 804-7, Judge De Haven, announcing the decision of this court on an Alaska appeal, cites the code section in question and says:

"The district court proceeded under the authority conferred by this section and gave the judgment now under review. The jurisdiction of the court to render such judgment was not challenged."

Intimating, it would seem, that such jurisdiction was wanting.

In all the Oregon cases the court seemed to consider the fundamental principle that no judgment can be rendered without jurisdiction so elementary as to require no argument beyond its naked suggestion. Counsel for plaintiff in error believe it superfluous to offer any argument on this question except these citations.

III.

THE COURT ERRED IN ENTERING ANY JUDGMENT AGAINST DEFENDANT BASED UPON THE COMPLAINT.

The Act of Congress of February 14, 1917, prohibiting the manufacture and sale of intoxicating liquors in Alaska, known as the "Alaska Bone Dry Law," provides in section 27 that it shall be the duty of all federal and municipal officials, naming each and every office, "to enforce the provisions of this act." Section 28 provides:

"Prosecutions for violations of the provisions of this Act shall be on information filed by any such officer before any justice of the peace or district judge, or upon indictment by any grand jury of the Territory of Alaska."

The complaint in this case was signed and verified by a person described as "private prosecutor." Plaintiff in error submits that in the face of the requirement that prosecutions "shall" be on "information" filed by a designated officer an information or complaint filed by a private prosecutor is void. If it be argued that the Alaska Code makes provision for prosecution of misdemeanors on complaint filed by private prosecutors the answer is that the prohibition law is a special statute which makes specific provision for its enforcement, and under the rule that penal statutes must be strictly construed it follows that this special provision excludes any other method of prosecution. *Expression unius exclusio alterius.*

“Where a statute creates a new offense and at the same time prescribes a particular and limited remedy, all different or other remedies than those prescribed are to be deemed excluded.” *Pentlarge v. Kirby*, 19 F. 501.

It will be noted that the act provides only for prosecution by indictment or information. The latter term has a meaning as specific and well known as indictment. It is a written charge made by an authorized public officer, usually a prosecuting attorney. 1 *Bish. Crim. Proc.*, sec. 141. When a private person is authorized by law to prefer a criminal charge it is known as a complaint, never an information. If any person can file a complaint under the law why should it specify that numerous designated officers are charged with its enforcement and that prosecutions shall be on information by such officers or by indictment?

If it be insisted that “shall” in the section mentioned is to be construed “may,” such construction still leaves no escape from “information.” Is it to be assumed that Congress, containing many able lawyers, did not know the difference between an information and a complaint?

A reason easily suggests itself in support of the theory that Congress intended prosecutions under the prohibition act to be instituted and con-

ducted by public officials. Prohibitory liquor laws more easily than almost any other included in penal codes lend themselves to private spite and revenge. It is not unreasonable to suppose that Congress intended to confine its enforcement to official authority. This theory would seem to find substantial basis in the enumeration of all the holders of all the offices in the territory as persons specially required to enforce the law. Further, the offenses denounced by the act are in their nature offenses against the public. The misdemeanors which may be prosecuted under the general code on complaint of private prosecutors are largely those which are perpetrated against individuals, such as assault and battery, petty larceny and injuries to private property. In these the individual chiefly is aggrieved, the public only incidentally. Hence the injured person is given the right to prosecute.

Finally, in support of the third assignment of error—invalidity of the complaint—plaintiff in error urges that the Alaska Bone Dry Law was impliedly repealed by the Eighteenth Amendment and the Volstead act, effective in January, 1920. The offense was charged to have been committed May 31, 1920. While it is true that implied repeals are not favored it is generally true that a

later act covering practically every provision of an earlier one abrogates the prior act. The Alaska prohibition law was an act of Congress, which has plenary power over the territories. The Volstead law was enacted by Congress in pursuance of a new national policy. It was an exercise of the police power intended to be uniform and as far-reaching as the Constitution. It seems unreasonable to assume that because the Volstead act did not directly repeal the Alaska law Congress intended to leave the latter as a cumulative law in a single territory, giving that territory a prohibition policy and creed different from other territories and all the states.

The doctrine of implied repeal is discussed and decided in *United States v. Tynen*, 11 Wall. 88, and the principle as laid down there was subsequently approved by the supreme court in the *Paquete Habana*, 175 U. S. 677, and in numerous cases cited in the latter case. Also in *Murphy v. Utter*, 186 U. S. 95.

Plaintiff in error respectfully submits that the judgment of the district court should be reversed with an order that the complaint be dismissed.

B. O. GRAHAM,
EDWARD F. MEDLEY,
E. E. RITCHIE,
Attorneys for Plaintiff in Error

NO. 3604

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IN THE UNITED STATES
Circuit Court of Appeals
FOR THE NINTH CIRCUIT
February Term, 1921

UNITED STATES OF AMERICA,

Plaintiff-Defendant in Error.

VS.

JOHN KOPPITZ,

Defendant-Plaintiff in Error.

Brief of Plaintiff--Defendant in Error

WILLIAM A. MUNLY,

United States Attorney, Valdez, Alaska,
Attorney for Plaintiff-Defendant in Error.

Filed this.....day of February, 1921,

FRANK D. MONCKTON, *Clerk*

By.....*Deputy Clerk.*

FILED
FEB 17 1921
F. D. MONCKTON

NO. 3604

IN THE UNITED STATES
Circuit Court of Appeals
FOR THE NINTH CIRCUIT
February Term, 1921

UNITED STATES OF AMERICA,
Plaintiff-Defendant in Error.

VS.

JOHN KOPPITZ,
Defendant-Plaintiff in Error.

On Writ of Error from the District Court for
the Territory of Alaska, Third Division.

Brief of Plaintiff--Defendant in Error

STATEMENT OF THE CASE.

This Writ of Error arose from a criminal complaint filed in the United States Commissioner's Court for the Territory of Alaska, Third Division, Cordova Precinct, at Cordova, in which the defen-

dant, John Koppitz, was charged as follows:

“The said John Koppitz in the Territory of Alaska and within the jurisdiction of this Court, did, wilfully and unlawfully, on the 31st day of May, 1920, at Cordova, Alaska be found drunk on the public streets, to-wit: in said Town of Cordova, contrary to the form of the Statute in such case made and provided and against the peace and dignity of the United States of America.”

It appears from the record of the proceedings in the Justice's (or Commissioner's) Court that the defendant pleaded not guilty and that on such plea, after a trial was had without a jury or demand for a jury and two witnesses were sworn for the prosecution, the defendant was found guilty and sentenced to pay a fine of \$250.00, and the costs of the action taxed at \$25.05, or by imprisonment in the Federal Jail not exceeding 125 days. Thereafter an alleged notice of appeal and bond on appeal were filed in the District Court of the Third Division, Territory of Alaska, within the required time. When the case came on for hearing in the District Court a motion was filed by the United States Attorney for the dismissal of the appeal from the judgment entered on the 2d day of June, 1920, which motion to dismiss was made on the ground that said alleged notice of appeal was void in that it did not sufficiently identify the judgment, and the Court, after hearing the argu-

ments of the respective counsel, sustained said motion and dismissed said appeal. A judgment was thereupon entered by the District Court on the 29th day of October, 1920, as follows:

“This matter coming on for hearing upon the motion filed herein by the United States Attorney for the dismissal of the appeal taken herein by the defendant from the judgment entered in the United States Commissioner’s Court for the Cordova Precinct, at Cordova, on the 2d day of June, 1920, on the grounds that said notice of appeal filed by the defendant was void for the reason that the same did not describe and identify the judgment entered in said Commissioner’s Court, or describe with particularity the crime for which defendant was convicted; and it appearing that the grounds for said motion to dismiss said appeal are good and insufficient and that said notice of appeal filed by the defendant is void; and it further appearing that a bond for costs on appeal in the sum of Five Hundred Dollars has been filed herein, wherein George Dooley and Tony Lynch are sureties; it is ordered that said appeal be and the same is hereby in all respects dismissed, and it is further ordered that the judgment entered in the Commissioner’s Court for the Cordova Precinct, at Cordova, on the 2d day of June, 1920, be entered herein.

It is therefore further ordered that said defendant John Koppitz, pay a fine of two hundred and fifty dollars, and that he be imprisoned one day for every \$2.00 of such fine as he shall or fail or refuse to pay, said imprisonment not to exceed one hundred and twenty-five days.

And it is further ordered and adjudged that

the United States of America do have and recover of said defendant John Koppitz, and George Dooley and Tony Lynch, the said sureties on his appeal bond, the costs of this prosecution taxed in the sum of \$94.20, and that execution issue for the same."

POINTS INVOLVED BY ASSIGNMENTS OF ERROR.

The Assignments of Error made by Plaintiff in Error are:

First: That the Court erred in entering the judgment of dismissal of the defendants appeal from the Justice's Court.

Second: That the Court erred in entering judgment and sentence against defendant after dismissing defendant's appeal.

Third: That the Court erred in entering any judgment against the defendant based upon the complaint in the action.

Not having a copy of the Brief of the defendant we are obliged to infer from the assignments the points and grounds upon which the defendant relies for a reversal of the judgment in this case, which may be briefly stated as follows:

1st. The prosecution in question was brought under Section 15 of what is known as the Territorial

Prohibition Law, Act of Congress of February 14, 1917, and not under the National Prohibition Law, known as the Volstead Act. The question may then arise as to whether said Section 15 of said Territorial Prohibition Act is in effect, the prosecution claiming in this case that there is nothing in the Volstead Act which covers the crime of public drunkenness, which crime is defined in Section 15 of the Territorial Prohibition Law, and is not therefore repealed by implication by the Volstead Act.

2d. The sufficiency of the alleged notice of appeal.

3d. As the trial of the defendant was had without a jury it may be claimed that such trial was void and unconstitutional.

4th. It may be claimed that the District Court, after the dismissal of the appeal on account of a void notice, is not empowered to render a judgment.

All of these points will be subsequently discussed in the argument.

POINTS AND AUTHORITIES.

I.

Section 15 of the Act of Congress of February 14, 1917, which is a special Act for the prohibition of intoxicating liquors in the Territory of Alaska, is in effect even if the other parts of the Act were superseded by the National Prohibition Law, which latter Act does not cover the crime of public drunkenness. The former Act could only be repealed *pro tanto* by implication.

United States v. Wood, 16 Pet. 342.

Witte v. Shelton, 240 Fed. 265.

Arthur v. Homer, 96 U. S. 137.

Gowen v. Harley, 56 Fed. 973.

II.

The right of appeal is a statutory or legislative privilege and not a constitutional privilege.

Town of Lafayette v. Clark, 9 Ore. 277.

United States v. Wonson, 1 Gal. 5, 28 F. Cas. No. 16,750.

The Schooner Constitution v. Woodworth, 1 Scam. 512.

Montfort v. Hall, 1 Mass. 443.

Brown v. Brown, 81 N. W. 627.

III.

The requirements of a notice of appeal should be strictly observed.

Comstock v. Tea Garden Packing Co., 156 S. W. 818, citing Brown on Jurisdiction, Section 41.

IV.

Notice of appeal is in the nature of a judicial process.

Weitzman v. Handy, et al., 1 Alas. 658.

United States v. Larson, 2 Alas. 578.

Kingsbury v. Pacific Coal and Transportation Co., 3 Alas. 41.

Driver v. McAllister, 1 Wash. Terr. 368.

Cooper v. Northern Acc. Co. 93 S. W. 871.

V.

The Alaska Courts from an early day have required a strict observance of the requirements in regard to notices of appeal and undertakings on appeal.

Weitzman v. Handy, et al., 1 Alas. 658, from the First Division, decided October, 1902.

United States v. Larson, 2 Alas. 578, from the Second Division, decided November 17, 1905.

Kingsbury v. Pacific Coal and Transportation Co., 3 Alas. 41, from the Second Division, decided on April 21, 1906.

United States v. Florence, 1 Alaska 676, decided December 8, 1902.

United States v. Sheep Creek John, 1 Alaska 682, decided December 8, 1902.

VI.

If the undertaking on appeal had not named the crime of drunkenness on a public street as the crime with which defendant was charged, it would have been void.

Belt v. Spaulding, 17 Ore. 130, 20 Pac. 827.

And for the same reasons the notice of appeal in this case should have specifically set forth the crime of drunkenness in the public streets.

VII.

Section 2527 of the Compiled Laws of Alaska of 1913 provided that "upon a plea other than a plea of guilty if the defendant do not then demand a trial by jury, the justice must proceed to try the issue." It is incumbent under such section for the defendant to demand a jury trial and if he does not do so, it is the duty of the Court to try the case without a jury.

People v. Cook, 45 Hun. 34.

State v. Mills, 39 N. J. Law (10 Vroom) 587.

People v. Luczak, 10 Misc. Rep. 590, 32 N. Y. Supp. 219.

State v. Larger, 45 Mo. 510.

State v. Wiley, 82 Mo. App. 61.

State v. Ill., 74 Ia. 441, 38 N. W. 143.

State v. Denoon, 34 W. Va. 139, 11 S. E. 1003.

State v. Alderton, 50 W. Va. 101, 40 S. E. 350.

Dailey v. State, 4 Ohio State 47.

VIII.

A waiver of a jury trial in a misdemeanor case is not obnoxious to any constitutional right.

Schick v. United States, 195 U. S. 65.

Belt v. United States, 4 App. Dec. 25.

In Re Belt, petitioner, 159 U. S. 95.

Hallinger v. Davis, 146 U. S. 314.

Ex Parte Dunlap, 5 Alas. 521.

Commonwealth v. Dailey, 12 Cush. (Mass.) 80.

Murphy v. Commonwealth, 1 Metc. (Ky.) 365.

Tyra v. Commonwealth, 2 Metc. (Ky.) 1.

State v. Kaufman, 51 Iowa 578, 2 N. W. 275,
33 Am. Rep. 148.

Connelly v. State, 60 Ala. 89, 31 Am. Rep. 34.

State v. Worden, 46 Conn. 349, 33 Am. Rep. 27.

People v. Rathbun, 21 Wend. (N. Y.), 509, 542.

IX.

Section 2559 of the Compiled Laws of Alaska provides as follows:

“That when an appeal is dismissed the appellate court must give a judgment as it was given in the court below, and against the appellant, for the costs and disbursements of the appeal. When judgment is given in the appellate court against the appellant, either with or without trial of the action, it must also be given against the sureties in his undertaking according to the nature and effect thereof.”

Judgment in the present case was given in accordance with the directions and authority of said section. It is merely providing for the docketing of the judgment of the justice court in the same manner as a judgment found in a justice court may be docketed in the District Court. See Sections 1813 and 1814, of the Compiled Laws of Alaska, 1913. Under said law it is mandatory to render said judgment.

Kaiser v. Gardiner, 211 S. W. 883.

With cases cited.

ARGUMENT.

SECTION 15 OF THE ALASKA TERRITORIAL
PROHIBITION LAW IS IN EFFECT

The charging part of the complaint in this case is as follows:

“The said John Koppitz in the Territory of Alaska, and within the jurisdiction of this Court, did, wilfully and unlawfully, on the 31st day of May, 1920, at Cordova, Alaska, be found drunk on the public streets, to-wit: in said Town of Cordova, contrary to the form of the Statute in such case made and provided and against the peace and dignity of the United States of America.”

This complaint is based upon Section 15 of the Alaska Prohibition Law, Act of Congress, of February 14, 1917, which went into effect on January 1, 1918, and which reads as follows:

“That any person who shall in or upon any passenger coach, street car, boat, or in or upon any other vehicle commonly used for the transportation of passengers, or in or about any depot, platform, or waiting room drink any intoxicating liquor of any kind, or any person who shall be drunk or intoxicated in any public or private road or street, or in any passenger coach, street car, or any public place or building, or at any public gathering, or any person who shall be drunk or intoxicated and shall disturb the peace of any person, shall be guilty of a misdemeanor.”

While it is claimed that the Alaska Prohibition Act is superseded by the National Prohibition Act in nearly all of its features, still it is our contention that Section 15 of the Alaska Prohibition Act is untouched and unimpaired by the National Prohibition Act. There is no provision in the Volstead Act covering the crime of public drunkenness, or drunkenness of any kind, and the rule of construction is that before a subsequent law will repeal a former law by implication there must be a positive repugnancy between the provisions of the new law and those of the old, and even then the old law is repealed by implication only *pro tanto* to the extent of the repugnancy as was stated by Justice Story in the early case of *Wood v. U. S.*, 16 Pet. 362.

In the case of *Witte v. Shelton*, 240 Fed. 265, considered and decided by the Circuit Court of Appeals for the Eighth Circuit, the question arose as to whether Section 238 of the United States Penal Code was repealed by the Act of March 1, 1913, commonly known as the Webb-Kenyon Act, and in said case it was held that to effect a repeal of a statute by implication by reason of inconsistency with a latter statute there must be such a positive repugnancy between the two statutes that they cannot stand together.

Arthur v. Homer, 96 U. S. 137.

Gowen v. Harley, 56 Fed. 973.

It was held in the *Witte-Shelton* case that there was no inconsistency between the two acts that were under consideration, although they both related to the transportation of intoxicating liquors. In the present case there is nothing in the Volstead Act which refers in any way to the crime of public drunkenness.

There is no direct repeal in the Volstead Act of the Territorial Law hereinbefore referred to, and there could not be a repeal by implication for the reason that the latter does not in any manner refer to or cover the subject of Section 15 of the Territorial Prohibition Act, and, therefore, the rule as laid down by Justice Storey, in any circumstances, would apply to the effect that if there be a repeal of the Territorial Act by the Volstead Act it must only be *pro tanto* and could not and would not apply to Section 15 covering the crime of public drunkenness.

THE RIGHT OF APPEAL IS NOT A CONSTITUTIONAL RIGHT.

The principal matter to be considered by this Writ of Error is whether the notice of appeal is sufficient to confer jurisdiction upon the District Court. Preliminary to that discussion it may be well to consider in a general way the right of appeal.

The right of appeal and to try a case *de novo* is a

creature of the statute, and is not a matter of constitutional right. This matter of the right of appeal is discussed in the *Town of Lafayette v. Clark*, 9 Ore. 227, in which arose the question as to whether the charter of the Town gave a right of appeal from the Recorder's Court. In discussing the general right of appeal in said case Judge Waldo declared:

“Appeals for the removal of causes from an inferior to a superior court for the purpose of obtaining trials *de novo*, are unknown to the common law, and can only be prosecuted where they are expressly given by statute.

The Schooner Constitution v. Woodworth, 1 Scam., 512.)

“In *United States v. Wonson*, 1 Gal. 5, Mr. Justice Story says that the word appeal comes from the civil law, and as a mode by which a cause may be retried on the facts, is a privilege existing by statute, and not by common law, and is considered by our courts as a mere legislative and not a constitutional privilege. He further says that many learned men have regarded its transfer into our system as a mischievous novelty.”

In the latter case of *United States v. Wonson*, found in 28 Fed. Cas. No. 16750, the case of *Monkfort v. Hall*, 1 Mass. 443, is cited in support of the proposition that a right of appeal is not a constitutional privilege. Being in derogation of common law, the

party seeking to avail himself of the privilege of appeal must comply strictly with all of the provisions of the statute conferring that right. See *Brown v. Brown*, 81 N. W. 627. And in *Comstock v. The Tea Garden Packing Co.*, 156 S. W. 818, speaking on appeals the Supreme Court of the State of Missouri lays down very clearly the strict rules which govern the manner and conditions that are essential to an appeal, in the following language:

“In *McGinnis & Ingels Co. v. Taylor*, 22 Mo. App. 513, 516, the court said: ‘The appellee may have actual knowledge of an appeal being taken. He may stand by and see it perfected, yet he must have the statutory notice, and this notice must describe the cause in which the appeal is taken. If the appellee’s knowledge of the appeal does not affect the matter, it would seem that evidence aliunde the notice showing that the appellee understood to what the notice referred should be rejected.’ Brown on Jurisdiction Sec. 41, speaking of notice and service says: * * * ‘Where it provides a form, or gives directions as to the manner of service, * * * the statute must be complied with strictly; the direction is mandatory. Great particularity is required in the notice of appeal. * * * It is a thing apart from the knowledge which the party to be notified may have. * * * Appellee may have actual knowledge of an appeal being taken. He may stand by and see it perfected, yet he must have the statutory notice, and this notice describe the cause in which the appeal is taken.’ ”

STRICT RULE OBSERVED IN ALASKA.

In Alaska there are particular reasons for the strict observance of the requirements of the statute. Congress in providing laws for Alaska gave the United States Commissioners acting ex-officio as Justices of the Peace considerable additional jurisdiction to that which a Justice of the Peace ordinarily has in the States, both in regard to civil matters and over criminal offenses. In civil matters a Commissioner as shown by Sections 366 and 1534 of the Compiled Laws of Alaska, 1913, a considerable jurisdiction for the recovery of money or damages, and specific personal property, and for several other matters to the extent of one thousand dollars. In criminal matters, as shown by Section 2519, he has jurisdiction of any misdemeanor punishable by imprisonment in the county (federal) jail, or by fine or both. In other words he has jurisdiction of any crime other than where the punishment would be imprisonment in the penitentiary. In granting such jurisdiction it will be seen that Congress took into consideration the conditions and difficulties of such an immense Territory as Alaska. As an illustration the Third Division of the Territory of Alaska contains an area of 162,000 square miles. Some commissioners therein are located at distances of two thou-

sand miles from the seat of the District Court, and nearly all the Commissioners are from one hundred to five hundred miles away from said headquarters of the District Court. Under such circumstances it was the manifest purpose of Congress that the Commissioners should deal with the great majority of the cases arising in their districts, and that their judgments should be generally final. As an illustration a laborer might have an action for his wages or upon some contract, or a man in any walk of life might have an action in contract for money due him, and he could recover the same by action in the Commissioner's Court to the jurisdictional limit of \$1000.00. If an appeal would be an easy matter the defendant in such case could cause infinite delay by taking an appeal, and possibly by such delay render such judgment inoperative, or by causing such an immense expense in the way of bringing witnesses for great distances and other expenses of trial, he could possibly prevent the plaintiff from prosecuting the case in the upper court.

In the case of *United States v. Hardy*, 186 U. S. 227, the Supreme Court of the United States seemed to have a very clear insight into and appreciation of the difficulties which impede litigation in the far northern territory, and while the remarks in that

case were applied to the question of continuance of a trial, they also shed light on the difficulties in the review of such trials in appellate courts, and in the way of procuring witnesses for trial in the lower courts.

The Supreme Court says:

“Under these circumstances it seems to us clear that the court did not abuse its discretion in refusing a continuance. It is true the trial was held in a remote part of the Nation, and where facilities for securing the attendance of witnesses were not as great as in more thickly settled portions; but it is also true that many of the witnesses for the government were engaged in prospecting, men without settled abodes, and whose attendance at subsequent terms it might have been difficult to secure, and it must have been perfectly obvious to defendant and his counsel that the longer he could postpone the trial the greater the probability of the absence of witnesses against him. It was the right of the court to consider all these matters.”

For these reasons, from the very beginning, Courts in Alaska in the different Divisions have adopted the strict rule in regard to the privilege of appeal, and have required notices of appeal and undertakings on appeal to be in strict conformity with the requirements, at the expense of the dismissal of such appeals if such strictness was not observed. There are a great many cases which have been de-

cided in Alaska dismissing appeals for void and improper notices and undertakings following the rules which were adopted in the courts in the early days from the different Divisions of Alaska, which rules are enunciated in cases reported as follows:

Weitzman v. Handy, et al., 1 Alas. 658, from the First Division, decided October, 1902.

United States v. Larson, reported in 2 Alas. 578, decided on November 17, 1905, from the Second Division.

Kingsbury v. Pacific Coal and Transportation Co., reported in 3 Alas. 41, from the Second Division, decided on April 21, 1906.

And *United States v. Florence* 1 Alas. 676, *United States v. Sheep Creek John*, 1 Alas. 682, both from the First Division on the matter of a void undertaking, decided December 8, 1902.

In all of these cases it is held that the notice of appeal is in the nature of a judicial process, following Jacobs, Judge, in *Driver v. McAllister*, 1 Wash. Terr. 368, and other cases.

As was said in *Weitzman v. Handy*, 1 Alas. 660:

“The notice of appeal provided by our statute is in the nature of a process whereby this

court obtains jurisdiction of cases appealed: that is, the giving of the notice is a preliminary step to be taken, and, if followed by other steps required by law, this court thereby obtains jurisdiction of the case. Being in the nature of a process, it should, I think, as clearly describe the parties, the nature of the judgment sought to be appealed from, the date on which such judgment was entered, the court in which entered, and the court to which appeal is taken, as a *summons* is required to indicate the *nature* of the action, the court in which brought, the parties to the action, and the amount sued for, when issued from the district court."

And as was said in *United States v. Larson*, 2 Alaska, 579:

"As this notice is a special of a judicial process, the sufficiency thereof must appear to the court on its face. The question for consideration is not whether the notice is sufficient to carry to the appellee or district attorney knowledge of the intention to appeal. The question rather is: Can the court, from a reading of the notice, determine what particular judgment or conviction was rendered; whether of larceny, assault, or other crime, by name or description."

And in *Kingsbury v. Pacific Coal and Transportation Company*, 3 Alas. 43, it is held:

"A notice of appeal from a commissioner's court is a species of judicial process (*Driver v. McAllister*, 1 Wash. T. 368), whose sufficiency must appear to the court on its face. The notice of appeal must be adequate, and there must be proper service thereof, or this court acquires

no jurisdiction of the person. In these particulars the notice bears a strong resemblance to a summons. The statute requires that in an action for the recovery of money or damages the summons shall state what sum judgment must be taken for upon default, and in other actions the summons must state that upon default of the defendant to answer the plaintiff will apply for the relief demanded. Section 44, Code Civ. Proc. Alaska. There is no reason why the process which summons the defendant into the commissioner's court should designate the judgment that will be taken upon default, while the process which brings the respondent into this court upon appeal and brings a proceeding *de novo* should be less specific. The purpose of the notice of appeal is to apprise the respondent of the institution of the appeal in a particular case. In passing upon a motion of this kind the court cannot consider any supposed actual knowledge alleged to exist in the mind of the respondent as to an action previously tried in the commissioner's court as supplementing in any manner the facts set forth in the notice of appeal. The sole question is: Does the notice of appeal on its face disclose such facts that the law will arbitrarily infer actual notice would be given even to a stranger?"

And further in the same case it is said:

"We concur with Judge Brown in *Weitzman v. Handy*, 1 Alaska, 658, and with the dissenting opinion of Dunbar, C. J., in *State ex rel Maltby v. Superior Court of Spokane County*, 7 Wash. 223, 34 Pac. 922, in suggesting that there may be more than one judgment rendered in the same court on a certain day and between the same parties. True, such might be unusual; but the rule

of law must cover the ordinary as well as the exceptional."

As we have said these cases at an early date in the juridical history of Alaska laid down the rule of strict procedure in cases of appeal on account of the peculiar conditions in the Territory, recognized both by Congress, and by the Courts, which had practical experience in the difficulties attending the administration of the law.

The privilege of appeal is not denied, but not being a constitutional right, but a statutory privilege, these early cases established a uniform rule in harmony with existing conditions, which rule has been consistently followed in numberless cases which have not been reported.

In the present case the notice of appeal gives the amount of the sentence and the costs, and describes that it is from a conviction under the Alaska Bone Dry Law, without giving any of the particular crimes that are enumerated and denounced by the law. In the first place, there is no such law known as the Alaska Bone Dry Law. It may be a familiar term used to designate the Act of Congress of February 14, 1917, although that law is not exactly bone dry as it permits the use of certain kinds of intoxicating liquors for scientific, artistic or mechanical

purposes, and for compounding and preparing medicines, and the shipment of wines for sacramental purposes. As we have said there were two laws in effect at the time the conviction in this case took place, viz., the Volstead Act, and the Act of Congress of February 14, 1917, and neither of these acts can be specifically designated as a Bone Dry Act. However, if we recognize the familiar designation of said Act of February 14, 1917, the notice does not refer to any particular crime which is denounced by that act. That act in Section One sets forth: "That it shall be unlawful for any person to manufacture, sell, give, or otherwise dispose of any intoxicating liquor or alcohol of any kind in the Territory of Alaska, or to have in his or its possession or to transport any intoxicating liquor or alcohol in the Territory of Alaska unless the same was procured and is so possessed and transported as hereinafter provided."

The conviction in this case is not under the general provisions of the act, but under a special provision of the act known as Section 15, which provides as follows:

" * * * * or any person who shall be drunk or intoxicated in any public or private road or street, or in any passenger coach, street car, or any public place or building, or at any public

gathering, or any person who shall be drunk or intoxicated and shall disturb the peace of any person, shall be guilty of a misdemeanor.”

It will be seen that it is an entirely separate and distinct offense from the crime which is described generally in the first section of said act. The complaint in this case, in its charging part, sets forth that the offense to which the accused pleaded not guilty and of which he was found guilty, to-wit, that he was found drunk on the public streets in the said town of Cordova, Alaska. Our contention is that the crime is not described by a mere reference to the Bone Dry Law or even reference to the Act of Congress of February 14, 1917, known as the Bone Dry Law. Each offense, to sell, manufacture, give or otherwise dispose of, transport, and have in possession liquor, would be a separate offense under said law, and if there would be a conviction under the same would have to be separately described in any complaint or notice of appeal, and it would not be a proper designation of any such crimes to describe it as a violation of the Bone Dry Law, or merely the Act of February 14, 1917. But in this case the crime is still more a distinctive one in that it is, as we have stated, a separate crime in that law, set forth in an entirely distinct section and not connected with anything that is denounced as a crime in section one of

that act. It is as separate as larceny, or assault, or other crime from one another, as is mentioned and is required by the rule as set forth by *United States v. Larson*, 2 Alas. 579. In *Kingsbury v. Pacific Coal and Transportation Co.*, 3 Alaska, 46, it is suggested that there may be more than one judgment rendered in the same court on the same day between the same parties, and there might easily be a violation of which a defendant might be convicted on the same day of each the several offenses set forth in the Act of Congress of February 14, 1917.

We claim and contend that it was necessary to describe the crime with which he was charged in the complaint, to which he pleaded not guilty, for which he was tried and found not guilty, to-wit, the crime of public drunkenness as denounced by Section 15 of said Act, and in describing in the notice of appeal the crime of which he was convicted it was necessary to set forth that it was public drunkenness. To show that that is necessary we will refer to the undertaking which was filed in this same case on the appeal from the Justice's Court to the District Court. It will be seen that the undertaking, setting forth the condition alone and omitting the other parts of the same, reads as follows:

“The conditions of the above undertaking are

such, that whereas, the said John Koppitz was, on the second day of June, 1920, in the above-entitled action and in the above-entitled court, before the Hon. R. H. L. Noaks, U. S. Commissioner and ex-officio Justice of the Peace in and for the Cordova Precinct, Third Division, Territory of Alaska, duly convicted of the crime of violating the Alaska Bone Dry Law, *by being drunk in the public streets*, in violation of an act entitled, 'To prohibit the manufacture or sale of alcoholic liquors in the Territory of Alaska, and for other purposes, enacted by the Congress of the United States of America, and approved February 14, 1917, and upon said conviction it was ordered and adjudged by the said U. S. Commissioner and ex-officio Justice of the Peace, that the said John Koppitz be fined the sum of Two Hundred and Fifty (\$250.00) Dollars and costs of the action taxed at \$25.05, or be imprisoned in the Federal Jail not exceeding one hundred and twenty-five days.'"

If the undertaking had not set forth that it was for the crime of being drunk in the public streets in violation of the Act of Congress of February 14, 1917, it would have been invalid. In *Belt v. Spaulding*, 20 Pac. 827, it was held by the Supreme Court of the State of Oregon that an undertaking of bail, taken before a magistrate must state briefly the specific nature of the crime charged, and that an undertaking which described the offense for which the defendant must appear and answer, by a general or familiar name failed to describe any offense as defined or made punishable by the Laws of the State of Ore-

gon, and for that failure, the undertaking in that case was declared to be void. We have cited that case merely to show that the undertaking in this case would have been invalid and unenforceable if it had not set forth the crime of drunkenness, and inasmuch as the notice on appeal is a judicial process, there is a stronger reason that there should be a specific and technical description of the crime in the notice of appeal. This rule is strictly in accordance with the holdings and decisions of the Alaska Courts from an early day, for the reasons which we have hereinbefore pointed out.

THE TRIAL COULD BE HAD BEFORE THE COURT WITHOUT A JURY.

The next point which may be assigned as error is that the court tried this case without a jury, which procedure invaded the constitutional rights of the defendant. The statute under which the Justice proceeded is found in Section 2527 of the Compiled Laws of Alaska, 1913, and reads as follows:

“That upon a plea other than a plea of guilty, if the defendant do not demand a trial by jury, the Justice must proceed to try the issue.”

It was incumbent upon the defendant to demand a jury trial under that statute, and it appears nowhere in the proceedings that he made any such de-

mand. If any such demand had been made it was incumbent upon the defendant to require the Justice by any proper proceedings to have the same appear, and in the absence of any steps taken by the defendant of that nature, it must be presumed that no demand had been made. Under Section 1834 of said Compiled Laws of Alaska, the appellant in a civil case must file within a certain number of days a transcript of cause, and reasoning by analogy if there is any absence of the record the duty would fall upon the appellant in this case to see that the record was a correct one.

Coming to the question as to whether the court could try the case and if it was the duty of the court to try the case, under said Section 2527, there are statutes in different States of the Union of a similar nature, and the decisions of the courts in these states will illuminate this phase of the question. There is a similar statute in the State of New York, and in *People v. Cook*, 45 Hun. 34, the court held as follows:

“Code Cr. Proc. Sec. 202 relating to proceedings in Courts of Special Sessions provides that before the evidence is heard defendant may demand a trial by Jury, and Sec. 701 that if defendant do not demand such trial the Court must proceed to try the issue. Defendant pleaded not guilty, and on being asked by the court if he was ready for trial he replied that he was, and the

court proceeded to try him forthwith, without objection on his part. Held, that this was a consent to be tried by the Court."

In the case of *People v. Luczak*, 10 Misc. Rep. 590, 32 N. Y. Supp. 219, it is held:

"Under Code Cr. Proc. Sec. 701, which provides that, if defendant in a court of special sessions 'do not demand a trial by jury the court must proceed to try the issue,' judgment of a conviction in a case tried without a jury is not defective merely because *it omits to show* that the defendant did not demand a jury."

In the case of *State v. Mills*, 39 N. ^{J.}~~Y.~~ Law. (10 Vroom) 587, it is held:

"The right to a jury trial is waived by defendants who were present at the trial before a Police Justice and permitted the case to be tried without intimating any desire for a Jury."

In the case of *State v. Larger*, 45 Mo. 510, it is held:

"If defendant in a misdemeanor case was unwilling to be tried by the Court, he should have objected at the time, and it is too late on appeal to object that he was not tried by a Jury."

In the case of the *State v. Wiley*, 82 Mo. App. 61, it was held:

"Where defendant, indicted for a misdemeanor, went to trial without a jury on a plea of former adjudication, and without objection to a

trial by the Court, such objection cannot be raised on appeal, since defendant will be presumed to have waived his right to a jury trial."

In the case of *State v. Ill.*, 74 Ia. 441, 38 N. W. 143:

"Under a statute which provided 'Upon a plea other than guilty if the defendant do not demand a trial by jury, the justice must proceed to try the issue unless a change of venue be applied for by the defendant,' it was held 'It will be noticed that the proper manner of trying a case of this kind in justice's court is to try by the justice, unless a jury is demanded by the defendant. In other words, if he fails to demand a jury he waives the right to be tried by one.' "

And in the case of *State v. Denoon*, 34 W. Va., 139, 11 S. E. 1003, in which the defendant was charged by indictment for selling spirituous liquors without a license, and which case was tried by the court in lieu of a jury, the Supreme Court of West Virginia held that in a misdemeanor case there may be a trial by the court in lieu of a jury where neither party requires a jury. This was approved in another liquor case, *State v. Alderton*, 50 W. Va. 101, 40 S. E. 350, in which the accused was charged with having owned and kept intoxicating liquors, with intent to sell the same contrary to law.

See also *Dailey v. State*, 4 Ohio State, 47.

WAIVER OF A JURY TRIAL IN MISDEMEANOR CASES PROPER.

It will appear from an inspection of these cases that several of them construed statutes which were exactly the same as Section 2527 of the Compiled Laws of Alaska, and the construction placed upon such statute, or one of that nature, is that the failure to demand a jury trial on the part of the defendant is tantamount and equivalent to a waiver of such jury trial. But it may be further contended that there could not be a waiver of a jury trial in this case, and that such waiver is in violation of the constitutional right of the defendant. Fortunately there has heretofore been a full discussion of this phase of the question in this Third Division of Alaska, and an exhaustive opinion has been delivered by the Court in the case of *ex parte Dunlap* found in 5 Alaska, 521, after a thorough argument had been heard and a complete examination of the question had been made. The decision in that case was to the effect that there could be a waiver of a jury trial in a case arising for a violation of the liquor laws of the Territory of Alaska as then existing, said violation being a misdemeanor in that case the same as it is in the present case. The question is of such importance that it is proper that a copious quotation from the opinion of

the Judge should be given in order to show the strength, reason and cogency of the Court's argument.

“The Court says:

“In *Schick v. United States*, 195 U. S. 65, 24 Sup. Ct. 826, 49 L. Ed. 99, I. Ann. Cas. 585, the Court, speaking by Mr. Justice Brewer, says:

‘ And it is a well known fact that in many territories organized by Act of Congress, the Legislature has authorized the prosecution of petty offenses in the police courts of cities without a jury. But if there be no constitutional or statutory provision or public policy requiring a jury in the trial of petty offenses, upon what ground can it be contended that a defendant therein may not voluntarily waive a jury? Can it be that a defendant can plead guilty of the most serious, even a capital offense, and thus dispense with all inquiry by a jury, and cannot when informed against for a petty offense, waive a trial by jury? Article 6 of the Amendments, as we have seen, gives the accused the right to a trial by jury. But the same article gives him the further right ‘to be confronted with the witnesses against him’ ‘and to have the assistance of counsel.’ Is it possible that an accused cannot admit and be bound by the admission that a witness not present would testify to certain facts? Can it be that if he does not wish the assistance of counsel, and waives it, the trial is invalid? It seems only necessary to ask these questions to answer them. When there is no constitutional or statutory mandate, and no public policy prohibiting, an accused may waive any privi-

lege which he is given the right to enjoy. Authorities in the state courts are in harmony with this thought. In *Commonwealth v. Dailey*, 12 Cush. (Mass.) 80, the defendant in a misdemeanor case waived his right to a full panel and consented to be tried by eleven jurors and this action was sustained by the Supreme Court of Massachusetts. Chief Justice Shaw, delivering the opinion of the Court said (page 83): 'He may waive any matter of form or substance excepting only what may relate to the jurisdiction of the court.' The same doctrine was laid down in *Murphy v. Commonwealth*, 1 Metc. (Ky.) 365, *Tyra v. Commonwealth*, 2 Metc. (Ky.) 1, and *State v. Kaufman*, 51 Iowa 578 (2 N. W. 275, 33 Am. Rep. 148.) In *Connelly v. State*, 60 Ala. 89, (31 Am. Rep. 34), a statute authorizing the waiver of a jury was sustained. The same rule was made in *State v. Worden*, 46 Conn. 349 (33 Am. Rep. 27), which was a case of felony. See also, *People v. Rathbun*, 21 Wend. (N. Y.) 509, 542. We are of the opinion that the waiver of a jury by the defendants in these cases and the consent to trial by the Court was not in conflict with law, and the judgments are therefore affirmed.'

In the Schick case there was no statute (as there is in the case at bar) authorizing the waiver of a jury trial, and Mr. Justice Harlan in his long dissenting opinion in that case (195 U. S. at page 81, 24 Sup. Ct. at page 832 (49 L. Ed. 99, 1 Ann. Cas. 585), says:

'If, in analogy to the powers exercised by the Parliament of England prior to the adoption of our Constitution, it should be held that Congress could treat the particular crime here in question as a petty offense triable by the

court, without a jury, or with a jury of less than twelve persons, it is sufficient to say that Congress has not legislated to that effect in respect of the offenses charged against these defendants, or of any other offense defined in the acts relating to oleomargarine. If it has the power to do so, Congress has not assumed, directly or indirectly, to withdraw such offenses from the operation of the constitutional provision that the trial of all crimes, except in cases of impeachment, shall be by jury. And the question is whether, in the face of that explicit provision and in the absence of any statute authorizing it to be done, the court, a jury being waived, had jurisdiction to try the accused for the crime charged.'

In *Belt v. United States*, 4 App. D. C. 25, a reference to which is found in 24 Cyc. 151, note 26, it is said:

'The weight of authority seems to be that, in the absence of express statutory authority, no accused person can waive a right of trial by jury in a criminal case; it being maintained that nothing can be waived which is jurisdictional or fundamental, or the observance of which is required by public policy; but if authorized by statute, the right to such trial may be waived.'

This case went on appeal to the Supreme Court of the United States and was there affirmed. In *re Belt, Petitioner*, 159 U. S. 95, 15 Sup. Ct. 987, 40 L. Ed. 88. See, also, *Hallinger v. Davis*, 146 U. S. 314, 13 Sup. Ct. 105, 36 L. Ed. 986.

A very interesting discussion of this subject is found in the case of *State v. Cottrill*, 31 W. Va. at page 202, 6 S. E. at page 449, where Snyder, Judge, says:

‘The whole history of English and American jurisprudence has been searched in vain to find a single precedent holding a statute unconstitutional which permits the accused in misdemeanor cases to waive a jury.’

A later case, *State v. Griggs*, 34 W. Va. 78 11 S. E. 740, approves the opinion of Judge Snyder.

The old distinctions of the common law are rapidly disappearing, and so far as they are a clog and hindrance on the practical administration of justice in this country they cannot disappear too fast.

‘The law is a progressive science’, said the Supreme Court of the United States in *Holder v. Hardy*, 169 U. S. 385, 18 Sup. Ct. 383, 42 L. Ed. 780.

The statute in question (Section 2527, Compiled Laws of Alaska), authorizing the waiving of a jury in misdemeanor cases, has been in operation in Alaska since 1899, and in Oregon, from whence it was taken, since 1864. During all these years innumerable cases have arisen and been disposed of under it, and no reported decision is found where its constitutionality has ever been questioned, until the case of *Virch v. Bishop*, *supra*. This long acquiescence alone is entitled to great weight in determining its validity, as well as other well-settled rules of statutory construction.

‘Legislative construction of constitutional provisions, adopted and acted on with the acquiescence of the people for many years, is entitled to great weight with the courts, and will not be disturbed, except for manifest error.’ *Stuart v. Laird*, 1 Cranch, 299, 2 L. Ed. 115,

followed in *U. S. v. Midwest Oil Co.*, 236 U. S. 473, 35 Sup. Ct. 309, 59 L. Ed. 673.

‘An Act of Congress will not be declared void, except in a clear case. Every possible presumption is in favor of the validity of the statute, and this continues until the contrary is shown beyond a rational doubt’. *Sinking Fund case*, 99 U. S. 718, 25 L. Ed. 496.

It is well known that in the immense and sparsely settled regions of Alaska it is often difficult and expensive to procure a jury of twelve men in courts of justices of the peace, in isolated places; and those charged with offenses often prefer to waive trial by jury rather than submit to the delay incident to procuring a jury. Again, this waiver may, and often does, operate to the advantage of an accused in that he may avoid the taxing of the costs of the jury against him in case of a verdict of guilty.

In 8 Cyc. p. 733, it is said:

‘A construction which must necessarily work great public and private mischief must never be preferred to a construction which will work neither, or neither in so great a degree, unless the terms absolutely require such a preference.’

‘In all such cases of construction, it should be borne in mind that broad questions of expediency and sound public policy are not to be overlooked.’

While a statute manifestly unconstitutional will not be upheld, on the ground either of long acquiescence or of expediency and public policy, these considerations are still entitled to weight.

What is there in the contemptible business of

‘peddling’ or ‘bootlegging’ whiskey to remove it from the class of petty offenses? For a first offense, under Section 2581, *supra*, the minimum penalty is a fine of \$100. Ordinarily this would be sufficient punishment for a first offense, with the hope of the reformation of the offender. But why should one, taking advantage of his own wrongdoing, after wilfully and recklessly defying the law, on conviction a third time, be shielded within the sanctuary of the Constitution? In all police courts habitual and incorrigible offenders are summarily sentenced to such long terms in jail as the exigencies of the case and the character of the prisoner require. Why should unlawful pandering to vicious and depraved appetites be dignified and raised to a higher degree of crime than that alleged against the victim and consumer, when later charged with being ‘drunk and disorderly’? Echo answers, ‘Why’?

The power of Congress to make regulations for controlling the liquor traffic in the territories had never been questioned.

‘The police power is an attribute of sovereignty, possessed by every sovereign state, and is a necessary attribute of every civilized government. It is inherent in the states of the American Union, and is not a grant derived from or under any written Constitution.’ 6 Ruling Case Law, Sec. 182.

The determination of this case requires the exercise of ‘practical common sense,’ the ‘rule of reason,’ freed from the trammels of the old common-law distinctions between the degrees of crimes as characterized hundreds of years ago under vastly different conditions.

An observation made by that great lawyer, Mr. Elihu Root, on the occasion of the American

Bar Association meeting, October 20, 1914, may be of interest:

‘The special class to which is committed the guardianship of the law always drifts away in time from the standards of the plain people, whom they serve, always becomes subtle, technical, over-refined, and the forms which they originally adopted to facilitate the process of getting at substantial justice come to be themselves the subject of controversy which obstructs the way of justice.’

Fortunately the spirit of enlightenment and liberal reason is abroad in our land, and a recent decision of the Supreme Court of the United States does much to clear away that mist of over-refinement and subtlety which has so often thwarted and defeated justice. Mr. Justice Day, in the case of *Garland v. Washington*, 232 U. S. at page 545, 34 Sup. Ct. at page 457 (58 L. Ed. 772), says:

‘Technical objections of this character were undoubtedly given much more weight formerly than they are now. Such rulings originated in that period of English history when the accused was entitled to few rights in the presentation of his defense, when he could not be represented by counsel, nor heard upon his own oath, and when the punishment of offenses, even of a trivial character, was of a severe and often a shocking nature. Under that system the courts were disposed to require that the technical forms and methods of procedure should be fully complied with. But with improved methods of procedure and greater privileges to the accused, any reason for such strict adherence to the mere formalities of trial would seem to have passed away, and we

think that the better opinion, when applied to a situation such as now confronts us, was expressed in the dissenting opinion of Mr. Justice Peckham, speaking for the minority of the court in the *Crain* case.'

The case over-rules *Crain v. United States*, 162 U. S. 625, 16 Sup. Ct. 952, 40 L. Ed. 1097, on the ground that the want of a formal arraignment did not deprive the accused of any substantial right and 'that the right sustained in a former case involving criminal procedure is no longer required for the protection of the accused.'

Thus are we finding, indeed, that the law is 'a progressive science, making for the surer protection of the innocent, and the swifter and more certain punishment of the guilty.' "

It will be seen, therefore, that under all these authorities it was proper for the court to proceed with the trial when no demand was made for a jury trial, in conformity with the express and controlling provision of the statute in this case.

DISTRICT COURT HAS JURISDICTION TO
RENDER JUDGMENT AFTER DIS-
MISSAL OF APPEAL.

The further matter to be considered is whether the District Court upon the dismissal of the appeal had jurisdiction to render a judgment which is virtually a repetition of the judgment rendered by the justice's court, with the addition of the costs accruing on appeal. In the absence of a statute empowering the District Court upon the dismissal of the appeal to render a judgment such as has been rendered in this case, it may be conceded that there would be no jurisdiction in the District Court to render such judgment. In such case, after the appeal would be dismissed there would be no question but the judgment of the Justice Court would remain intact and in force. But in the present case there is a statute directing that after a dismissal in such case a judgment should be entered. This statute is found in Section 2559 of the Compiled Laws of Alaska of 1913, and is as follows:

“That when an appeal is dismissed the appellate court must give a judgment as it was given in the court below, and against the appellant, for the costs and disbursements of the appeal. When judgment is given in the appellate court against the appellant, either with or without trial of the action, it must also be given against the sureties

in his undertaking according to the nature and effect thereof.”

Our contention is that the statute is mandatory and if the District Court had failed to render such a judgment it might have been ground for error. The question arises then whether such statute is void and unconstitutional as rendered without jurisdiction and not affording a hearing to the defendant, or is the statute to be given effect, and if so what are the reasons for giving it effect. True, the District Court has no right to render a judgment other than the one that was given in the Justice's court, except in the matter of costs, but it seems an analogy with other statutes that such a statute would not be void and would confer upon the upper court the power to render such judgment. To give this statute effect would not be in the nature of rendering a judgment without notice, without a hearing to the defendant, without due process of law, and would not be obnoxious to any constitutional right or guaranty. As we have said, if there was no statute the judgment in the Justice's court would remain unimpaired. Now this statute simply gives the right to the District Court to transfer the judgment of the Justice's court to the docket of the District Court.

Sections 1813 and 1814 of the Compiled Laws of

Alaska, provides for the transfer of a judgment and the effect to be given to such transfer from a Justice's court to the District Court. Such sections read as follows:

“Sec. 1813. Whenever a judgment is given in a justice's court in favor of anyone, for the sum of ten dollars or more, exclusive of costs and disbursements, the party in whose favor such judgment is given may, within one year thereafter, file a certified transcript thereof with the Clerk of the District Clerk, and thereupon such Clerk shall immediately docket the same in the judgment docket of the District Court.”

“Section 1814. From the time of docketing a judgment of (in) a District Court, as provided in the last section, the same shall be a lien upon the real property of the defendant, as if it were a judgment of the District Court wherein it is docketed.”

By virtue of these sections full effect is given in the dockets of the District Court to judgments which have been obtained in the Justice's court without giving any further notice to the defendant affected by such judgments, or without any further proceedings than the transfer of the judgment, which transfer is a special right given by virtue of the statute alone. This effect is all that we claim by virtue of Section 2559, *supra*. It simply gives the District Court the right under the statute to transfer the judgment of the Justice's court into the docket of the

District Court. It is a statutory right and is not assailable on any constitutional ground any more than are Sections 1813 and 1814 to which reference has been made, which sections have never been so far as our knowledge extends, objected to on any grounds of invalidity. If Sections 1813 and 1814 were not in effect then it is undoubted that the judgments of the Justice's court could not be placed upon the docket of the District Court, and could not be enforced from that court. In like manner, if there was no such statute as Section 2559, *supra*, upon dismissal of an appeal there would be no authority to transfer the judgment of the Justice's court to the District Court. The transfer is made by reason of the statute, and as we have contended, such statute does not invade any constitutional right, and its rendition is mandatory on the District Court. Section 2559 gives the District Court the right to impose the additional costs of the appeal, but this would be a proper allowance to be made by the District Court as a penalty on the dismissal of the appeal. The District Court has a certain jurisdiction in hearing an appeal where there is a void notice as we claim there is in the present case. The matter of the motion for the dismissal must be heard, and is a matter which is entirely within the jurisdiction of the District Court.

To that extent the appeal is within the District Court's jurisdiction and it would be proper and natural that the Court would have the resultant right to award the additional costs in such case.

We have not observed any cases in which this statute has been construed or discussed, but it seems to us that the construction for which we contend here would sustain the statute, would be entirely in accordance with its intention and purpose, and would not result in conferring any other jurisdiction on the Court except for the transfer of the judgment from the Justice's court to the District Court. There seems to be a statute of similar import in the State of Missouri.

It seems that the statute of Missouri, known as Section 7584 in that State, as shown by the case of *Kaiser v. Gardiner*, 211 S. W. 883, reads as follows:

“The appellant shall fail to give such notice at least ten days before the second term of the appellate court after the appeal is taken, or the judgment shall be affirmed, or the appeal dismissed, at the option of the appellee.”

That case then holds:

“Absent the timely notice of appeal, then by section 7584 respondent has the absolute right to control the disposition of the case, and at his option the appeal shall be dismissed or the judgment affirmed. The section is mandatory. *Scien-*

tific American Club v. Horchitz, 128 Mo. App. 575, 106 S. W. 1117; *Butler v. Pierce*, 115 Mo. App. 40, 90 S. W. 425; *Wolff v. Coffin*, 46 Mo. App. 192; *Hammel v. Weiss*, 54 Mo. App. 16."

This case would seem to us to be in support of our contention as to the proper interpretation and construction of Section 2559, and that it was mandatory to repeat the judgment of the Justice court, adding thereto the costs of appeal, as provided by the statute.

CONCLUSION.

In conclusion, we have shown that Section 15 of the special prohibition law having application to the Territory of Alaska is in effect; that said section is a particular section defining the crime or offense of public drunkenness and making it a misdemeanor; we have shown that the right of appeal is a statutory or legislative privilege as contradistinguished from a constitutional right; that the notice of appeal as provided by our statute is in the nature of a judicial process and all the requirements of the statute should be strictly followed; that the practice of the courts in Alaska from a very early time, in passing on notices of appeal, has been to require strict observance of all of the conditions on account of the peculiar situation and difficulties attending the administration

of justice; that the defendant in the present instance was convicted of the crime of drunkenness in the public street of Cordova, Alaska, and that while the undertaking on appeal set forth that such was the offense, the notice of appeal did not describe the specific crime *eo nomine* and such notice was, therefore, void. We have further shown that under Section 2527 of the Compiled Laws of Alaska of 1913, it was proper and the duty of the Justice to proceed with the trial without a jury when no jury was demanded, and that a failure to demand a jury trial was tantamount to a waiver thereof and that there is no constitutional objection to a waiver of a jury trial in a misdemeanor case; and finally it was proper and mandatory upon the District Court upon the dismissal of the appeal to render a judgment as was given in the court below against the appellant, and for the costs and disbursements of the appeal in accordance with the provisions of Section 2559 of the Compiled Laws of Alaska of 1913; and in view of our contentions and the authorities which we have cited, we respectfully ask that there be an affirmance of the judgment rendered by the District Court in this case.

Respectfully submitted,

WILLIAM A. MUNLY,

United States Attorney.

United States
Circuit Court of Appeals[✓]
For the Ninth Circuit.

The Steamship "PORTLAND," Her Engines, Boilers, Boats, Tackle, Apparel, Furniture and Appurtenances, and THE NATIONAL SURETY COMPANY, a Corporation,
Appellants,

vs.

UNION OIL COMPANY OF CALIFORNIA, a Corporation,
Appellee.

Apostles on Appeal.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California,
First Division.

FILED

JUL 14 1921

F. D. MONTGOMERY

United States
Circuit Court of Appeals
For the Ninth Circuit.

The Steamship "PORTLAND," Her Engines, Boilers, Boats, Tackle, Apparel, Furniture and Appurtenances, and THE NATIONAL SURETY COMPANY, a Corporation,
Appellants,

vs.

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Appellee.

Apostles on Appeal.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California,
First Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the Southern Division of the United States
District Court, for the Northern District of
California, First Division.

IN ADMIRALTY—No. 15,370.

CLERK'S OFFICE.

UNION OIL COMPANY OF CALIFORNIA, a
Corporation,

Libellant,

vs.

The Steamship "PORTLAND," etc.,

Respondent.

Praecipe for Apostles on Appeal.

To the Clerk of Said Court:

Sir: Please incorporate in the Apostles on Appeal in the above-entitled matter the following:

This Praecipe.

Claim.

Bond for Release of Vessel.

Amended Libel.

Answer to Amended Libel.

Statement of Facts.

Interlocutory Decree.

Final Decree.

Notices of Appeal Filed August 10, 1920, and Nov.
22, 1920.

Bond for Costs on Appeal.

Bond Staying Execution on Appeal.

Notice of Filing Bonds on Appeal.

Assignment of Errors.

Citation on Appeal.

Dated San Francisco, November 23, 1920.

ANDROS & HENGSTLER,

LOUIS T. HENGSTLER,

Proctors for Appellant.

[Endorsed]: Filed Nov. 24, 1920. W. B. Maling,
Clerk. By C. M. Taylor, Deputy Clerk. [1*]

In the Southern Division of the District Court of
the United States for the Northern District of
California, First Division.

No. 15,370.

UNION OIL COMPANY OF CALIFORNIA, a
Corporation,

Libelant,

vs.

The Steamship "PORTLAND," Her Engines, etc.,
Respondent.

Statement of Clerk U. S. District Court.

PARTIES.

Libelant: UNION OIL COMPANY OF CALI-
FORNIA, a Corporation.

Respondent: The Steamship "PORTLAND," Her
Engines, etc.

Claimant: GLOBE GRAIN & MILLING COM-
PANY, a Corporation. [2]

*Page-number appearing at foot of page of original certified Apostles
on Appeal.

PROCTORS.

For Libelant: McCUTCHEN, WILLARD, MAN-
NON & GREENE (formerly, McCUTCHEN,
OLNEY & WILLARD), San Francisco.

For Respondent and Claimant: ANDROS &
HENGSTLER, San Francisco.

PROCEEDINGS.

1913.

January 29. Filed libel in rem, for supplies
furnished, in the sum of \$4,607.81.
Issued monition for the attachment
of said steamer, which monition
was, on the following day, re-
turned with this return endorsed
thereon: "In obedience to the
within monition, I attached the
steamship 'Portland' therein de-
scribed, on the 29th day of Janu-
ary, 1913, and have given due
notice to all persons claiming the
same that this Court will, on the
13th day of February, 1913 (if
that day be a day of jurisdiction,
if not, on the next day of juris-
diction thereafter), proceed to
trial and condemnation thereof,
should no claim be interposed for
the same. I further return that
I posted a notice of seizure on the
herein-named steamship 'Port-
land,' and I further return that

I seized the steamship 'Portland' at Moore and Scott's Shipyards on the Estuary, in Oakland, Alameda County, California; I handed to and left a copy of the within monition with Vasilio Theodoro, watchman on the steamship 'Portland.'

San Francisco, Cal., January 30, 1913.

C. T. ELLIOTT,

United States Marshal.

By M. J. Fitzgerald,

Office Deputy." [3]

- January 30. Filed claim of Globe Grain & Milling Co. to steamship "Portland." Filed admiralty stipulation for the release of said steamship in the sum of \$6,500.00.
- February 18. Proclamation made.
- June 2. Filed exceptions to libel.
- 1916.
- November 22. Filed amended libel.
- December 12. Filed exceptions to amended libel.
- 1917.
- May 5. Hearing was this day had on the exceptions to the amended libel, before the Honorable M. T. Dooling, Judge. The exceptions were ordered overruled.
- October 22. Filed answer to amended libel.

1919.

June 5. Filed stipulation of facts.

September 11. Cause ordered submitted on record.

1920.

May 14. Filed order that decree be entered in favor of libelant, and referring the cause to U. S. Commissioner to ascertain and report the amount due.

25. Filed final decree.

August 10. Filed notice of appeal.
Filed assignment of errors.

18. Filed cost bond, and bond staying execution.

November 22. Filed notice of appeal, and stipulation that the same may be filed in lieu of the one heretofore filed.
Filed Citation on appeal. [4]

In the District Court of the United States of
America, Northern District of California.

IN ADMIRALTY—No. 15,370.

UNION OIL COMPANY OF CALIFORNIA, a
Corporation,

Libelant,

vs.

American Steamship "PORTLAND,"

Respondent.

(Claim.)

To the Honorable JOHN J. DE HAVEN, Judge
of the District Court of the United States for
the Northern District of California:

The claim of ——— to the American steamship
"Portland," her tackle, apparel and furniture, now
in the custody of the Marshal of the United States
for the said Northern District of California, at the
suit of Union Oil Company of California, a corpo-
ration, alleges:

That Globe Grain and Milling Co., a corporation,
the true and *bona fide* owner of the said American
steamship "Portland," her tackle, apparel and fur-
niture, and that no other person is owner thereof.

WHEREFORE, this claimant prays that this
Honorable Court will be pleased to decree a restitu-
tion of the same to claimant and otherwise right
and justice to administer in the premises.

GLOBE GRAIN & MILLING Co.

Per R. J. RINGWOOD.

ANDROS & HENGSTLER,

Proctors for Claimant.

Northern District of California,—ss.

Subscribed and sworn to before me this 30th day
of Jany., A. D. 1913.

[Seal]

FRANCIS KRULL,
Deputy Clerk of the District Court, Northern Dis-
trict of California.

[Endorsed]: Filed Jan. 30, 1913. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [5]

(Bond for Release of Vessel.)

No. 15,370.

District Court of the United States for the Northern District of California, First Division.

IN ADMIRALTY.

STIPULATION ENTERED INTO IN PURSUANT TO THE RULES OF PRACTICE OF THIS COURT.

WHEREAS, a libel was filed on the 29th day of Jany., in the year of our Lord one thousand nine hundred and thirteen, by Union Oil Company of California against the S. S. "Portland," etc., for the reasons and causes in the said libel mentioned; and, whereas, the said steamship is in the custody of the United States Marshal, under the process issued in pursuance of the prayer of said libel, and whereas the said steamship "Portland," etc., has been claimed by Globe Grain & Milling Co.; and, whereas, it has been stipulated that said steamship may be released from arrest upon the giving and filing of an admiralty stipulation in the sum of Six Thousand Five Hundred Dollars, as appears from said stipulation now on file in said court; and the parties hereto hereby consenting and agreeing that, in case of default or contumacy on the part of the claimant or their sureties, execution for the above amount may issue against their goods, chattels and lands:

NOW, THEREFORE, the condition of this stip-

ulation is such, that if the stipulators undersigned shall at any time, upon the interlocutory or final order or decree of the said District Court, or of any appellate court to which the above-named suit may proceed, and upon notice of such order or decree, to Andros & Hengstler, proctors for the claimant of said steamship, abide by and pay the money awarded by the final Decree rendered by the Court or the Appellate Court if any appeal intervene, then this stipulation to be void, otherwise to remain in full force and virtue. [6]

GLOBE GRAIN & MILLING CO.,

By R. J. RINGWOOD,

NATIONAL SURETY CO. (Seal)

By FRANK L. GILBERT,

Its Attorney in Fact.

Taken and acknowledged this 30th day of Jany., 1913, before me,

[Seal]

FRANCIS KRULL,

United States Commissioner, Northern District of California.

Northern District of California,—ss.

Frank L. Gilbert, atty. in fact for National Surety Co., party to the above stipulation, being duly sworn, depose and say, each for himself, that he is worth the sum of five hundred thousand dollars over and above all his just debts and liabilities.

FRANK L. GILBERT.

Sworn to this 30th day of Jany., 1913, before me,

FRANCIS KRULL,

United States Commissioner, Northern District of California.

Filed the 30th day of Jany., 1913. W. B. Mal-
ing, Clerk. By Francis Krull, Deputy Clerk. [7]

In the United States District Court for the North-
ern District of California, First Division.

IN ADMIRALTY—No. 15,370.

UNION OIL COMPANY OF CALIFORNIA, a
Corporation,

Libelant,

vs.

The Steamship "PORTLAND," Her Engines, etc.,
Respondent.

Amended Libel.

To the Honorable, the Judges of the United States
District Court for the Northern District of
California:

The amended libel of the Union Oil Company of
California, a corporation, against the steamship
"Portland," her engines, boilers, boats, tackle, ap-
parel, furniture and appurtenances, alleges as fol-
lows:

I.

That libelant is a corporation, duly organized and
existing under and by virtue of the laws of the
State of California.

II.

That respondent steamship is an American ves-
sel, and was lying in the waters of San Francisco
Bay, within the jurisdiction of the United States

and of this Honorable Court at the time the libel herein was filed. [8]

III.

That libelant has heretofore on about the dates hereinafter mentioned furnished respondent vessel with the following supplies and necessities, to wit:

1. July 5, 1912, at Oleum, California,
3,500 feet of dunnage of the value
of\$ 43.75
2. July 24, 1912, at Balboa, Canal Zone,
797.78 barrels of fuel oil of the value
of 997.23
3. August 5, 1912, at Balboa, Canal Zone,
315.34 barrels of fuel oil of the value
of 394.18
4. August 31, 1912, at San Francisco,
California, 2,959.13 barrels of fuel oil
of the value of..... 1923.44
5. November 27, 1912, at Balboa, Canal
Zone, 999.37 barrels of fuel oil of the
value of 1249.21

IV.

That the dunnage and fuel oil aforesaid was furnished by order of the master and charterer of said vessel, and was charged to said vessel by libelant; that libelant is informed and believes and so alleges that the charter-party, under which said vessel was chartered to the California-Atlantic Steamship Company, did not by its terms provide that the charterer or the master should be without authority to bind the vessel for said supplies and necessities.

V.

That libelant has a maritime lien upon said vessel for the sum of \$4,607.81, together with interest thereon, said sum being the total value of aforesaid supplies and necessities.

VI.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the [9] United States and of this Honorable Court.

WHEREFORE, libelant prays that process in due form of law according to the course of this Honorable Court in cases of admiralty and maritime jurisdiction may issue against said steamship "Portland," her engines, boilers, boats, tackle, apparel, furniture and appurtenances, and that all persons having any interest therein may be cited to appear and answer, on oath, all and singular the matters aforesaid, and that this Honorable Court will be pleased to decree the payment of the aforesaid damages, with interest, and that said vessel be condemned and sold to pay the same; and that libelant may have such other and further relief as in law and justice it may be entitled to receive.

IRA A. CAMPBELL,

F. H. GOULD,

Proctors for Libelant. [10]

State of California,
County of Los Angeles,—ss.

E. W. Clark, being first duly sworn, on oath, deposes and says:

That he is the vice-president of the Union Oil Com-

pany of California, a corporation; that he has read the foregoing amended libel, knows the contents thereof, and believes the same to be true.

E. W. CLARK.

Subscribed and sworn to before me this 20th day of November, 1916.

[Seal] HAZEL M. GILBERT,
Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: Service of the within amended libel and receipt of a copy is hereby admitted this 22d day of November, 1916.

ANDROS & HENGSTLER,
GOLDEN W. BELL,
Proctors for Claimant.

Filed Nov. 22, 1916. W. B. Maling, Clerk. By
C. W. Calbreath, Deputy Clerk. [11]

In the United States District Court of the Northern
District of California, First Division.

IN ADMIRALTY—No. 15,370.

UNION OIL COMPANY OF CALIFORNIA, a
Corporation,

Libelant,

vs.

The Steamship "PORTLAND," Her Engines, etc.,
Respondent.

Answer.

To the Honorable M. T. DOOLING, Judge of the
United States District Court, for the Northern
District of California:

The answer of claimant herein to the libel on file
herein respectfully admits, denies and alleges as
follows:

I.

Answering unto Article I of said libel, alleges that
claimant is not sufficiently advised to enable it to ad-
mit or deny the allegation therein set out and calls
for proof thereof if material.

II.

Answering unto Article II of said libel, admits the
allegations therein set out.

III.

Answering unto Article III of said libel, alleges
that claimant is not sufficiently advised to enable it
to admit or deny the allegations therein set out or any
of them and calls for proof thereof if material. [12]

IV.

Answering unto Article IV of said libel, denies
that the alleged dunnage and fuel oil was furnished
by order of the master and charterer or by the master
of said vessel; denies that the charter-party under
which the said vessel was chartered to the California-
Atlantic Steamship Company did not by its terms
provide that the charterer should be without au-
thority to bind the vessel for said alleged supplies
and necessaries and in this behalf claimant alleges
that the said charterer was without authority under

the terms of the said charter-party to bind the vessel for said alleged or any supplies as necessities, and that libelant well knew the facts in the allegation last above.

V.

Answering unto Article V of said libel, denies that libelant has a maritime lien upon the said vessel for the sum of four thousand six hundred and seven and .81/100 (4,607.81) dollars, together with interest thereon, or for any sum or sums with or without interest thereon or any maritime lien of any nature whatsoever; alleges that claimant is not sufficiently advised as to the other matters in said article set out to enable it to admit or deny the same and calls for proof thereof if material.

VI.

Answering unto Article VI of said libel, denies that all and singular the premises therein referred to are true except as they are in this answer expressly admitted.

WHEREFORE, claimant prays that the amended libel herein be dismissed and that claimant recover his costs herein and that [13] he have such other and further relief as may be meet and proper in the premises.

ANDROS & HENGSTLER,

Attorneys for Claimant. [14]

State of California,

City and County of San Francisco,—ss.

Louis T. Hengstler, being first duly sworn, deposes and says:

That he is one of the proctors for claimant herein; that claimant is absent from the City and County of San Francisco and affiant makes this verification for that reason and in behalf of said claimant; that affiant's sources of knowledge are facts revealed by personal investigation and original documents; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge except as to the matters alleged on information and belief and as to such matters, he believes it to be true.

LOUIS T. HENGSTLER.

Subscribed and sworn to before me this 18 day of October, 1917.

[Seal]

S. I. CLARK,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Due service and receipt of a copy of the within answer is hereby admitted this 22d day of October, 1917.

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Proctors for Libelant.

Filed Oct. 22, 1917. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [15]

In the United States District Court for the Northern
District of California, First Division.

IN ADMIRALTY.—No. 15,370.

UNION OIL COMPANY OF CALIFORNIA, a
Corporation,

Libelant,

vs.

The Steamship "PORTLAND," Her Engines, etc.,
Respondent.

Memorandum for Stipulation of Facts.

IT IS HEREBY STIPULATED by and between
the parties hereto that this cause may be submitted
for decision upon the following stipulation of facts,
to wit:

I.

Libelant is a corporation organized and existing
under and by virtue of the laws of the State of Cali-
fornia, and respondent steamship "Portland" at the
time of seizure herein was within the jurisdiction of
the above-entitled court.

II.

On 28 August, 1911, owners of respondent steam-
ship "Portland" entered into a charter-party with
California-Atlantic Steamship Company, whereby
owners chartered said steamship to said California-
Atlantic Steamship Company, hereinafter referred
to as charterer, for twenty-four calendar months
with an option to extend the same, said charter being
subject to the following terms and conditions among
others:

1. That the owners shall provide and pay for all provisions, water, wages and consular shipping and discharging fees of the Captain, Officers, Engineers, Fireman and Crew; shall pay for the insurance of the vessel, also for all the cabin, deck, engine-room and other necessary stores, and shall maintain her in a thoroughly efficient state in hull and machinery for and during the service. [16]

2. That the charterers shall provide and pay for all the Fuel, Port Charges, Pilotages, Agencies, Commissions, Consular Charges (except those pertaining to the captain, officers or crew), and all other charges whatsoever, except those before stated or hereafter provided to be paid by the owners.

3. That the charterers shall accept and pay at once on delivery of steamer for all fuel in the steamer's bunkers or tanks on delivery, and the owners shall, on expiration of this charter-party, pay for all fuel left in the bunkers or tanks, each at the current market prices at the respective ports where she is delivered to them respectively.

Libelants at all times herein mentioned knew that said California-Atlantic Steamship Company had said vessel under charter as aforesaid, but had not seen same and did not know the terms or conditions thereof.

III.

On 18th April, 1911, said charterers entered into a contract in writing with libelant, wherein and whereby said charterers agreed to use oil as fuel in

the operation of its then steamers under charter, known as "Navajo," "Mackinaw," "Olson & Mahoney," "Pleiades," "Riverside," "Leelanaw," and "Stanley Dollar," and such other steamers as charterer may charter or operate on the Pacific Coast in its California-Atlantic service, and to purchase from libelant all oil required in the operation of any steamers chartered subsequent to said 18 April, 1911, not specifically mentioned therein, except in such cases as the charter of said vessel might include fuel, and whereby libelant agreed to sell said charterers said oil at the prices and to deliver the same at the places in said agreement specified.

It was therein provided among other things, as follows:

"TIMES OF PAYMENT: All deliveries hereunder in any calendar month shall be settled and paid for in United States Gold Coin, at the price or prices aforesaid, not later than the tenth day of the next succeeding month. Default in any payment for a period of [17] ten days shall justify the cancellation of this contract, at the option of the first party, but if said contract is not cancelled therefor, and while such delinquency continues, the party of the first part may require prepayment for all deliveries hereunder."

IV.

From time to time libelant furnished to said steamer "Portland" fuel oil in the amounts as follows, upon orders from the Master:

1. July 5, 1912, at Oleum, California, 3,500
feet of dunnage of the value of \$ 43.75
2. July 24, 1912, at Balboa, Canal Zone,
707.78 barrels of fuel oil of the
value of 997.23
3. August 5, 1912, at Balboa, Canal Zone,
315.34 barrels of fuel oil of the
value of 394.18
4. August 31, 1912, at San Francisco, Cal-
ifornia, 2,959.13 barrels of fuel oil of
the value of 1,923.44
5. November 27, 1912, at Balboa, Canal
Zone, 999.37 barrels of fuel oil of the
value of 1,249.21

V.

Between the 18 April, 1911, and 28 August, 1911, Mr. R. J. Keown, representing libelant, called Mr. A. S. Cheesebrough, representing said California-Atlantic Steamship Company, to the former's office, the former telling the latter that it would be necessary thereafter to charge any oil and dunnage furnished to the vessels mentioned in said agreement of 18 April, 1911, to the vessels. Mr. Cheesebrough consented thereto. Thereafter oil and dunnage furnished said vessels, including said steamship "Portland," were charged on the books of libelant to the vessel to which the oil and dunnage were furnished respectively, and bills therefor were delivered to said California-Atlantic Steamship Company, wherein the oil and dunnage furnished to the said [18] vessels, including the steamship "Portland," whose home port was New York, were charged to the vessels

respectively and charterer, as follows: "S. S. 'Portland' and Charterer, to Union Oil Company of California, Dr.," etc. Said oil and dunnage was furnished at the prices and under the conditions specified in said agreement of 18 April, 1911, except as modified in this section.

VI.

All bills for oil and dunnage furnished said steamship "Portland" so rendered as aforesaid were paid by said California-Atlantic Steamship Company, except the bills for oil and dunnage as set forth in section IV hereof, no part of which has been paid.

Dated: March —, 1919.

McCUTCHEN & WILLARD,
Proctors for Libelant.
ANDROS & HENGSTLER,
Proctors for Respondent.

[Endorsed]: Filed Jun. 5, 1919. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [19]

In the Southern Division of the United States
District Court, for the Northern District of
California, First Division.

IN ADMIRALTY—No. 15,370.

UNION OIL COMPANY OF CALIFORNIA, a
Corporation,

Libelant,

vs.

The Steamship PORTLAND, etc.,

Respondent.

McCUTCHEN, WILLARD, MANNON & GREEN,
Proctors for Libelant.

ANDROS & HENGSTLER, Proctors for Claimant.

**(Order That Decree be Entered in Favor of Libelant,
etc.)**

A decree will be entered in favor of libelant, and
the cause referred to the commissioner to ascertain
and report the amount due.

May 14th, 1920.

M. T. DOOLING,
Judge.

[Endorsed]: Filed May 14, 1920. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [20]

In the Southern Division of the United States
District Court, for the Northern District of
California, First Division.

IN ADMIRALTY—No. 15,370.

UNION OIL COMPANY OF CALIFORNIA, a
Corporation,

Libelant,

vs.

The Steamship "PORTLAND," etc.,

Respondent.

Decree.

The above-entitled cause having come on regularly for trial upon an agreed statement of facts, libelant appearing by Messrs, McCutchen, Willard, Mannon & Greene, its proctors, and claimant and respondent appearing by Messrs. Andros & Hengstler, its proctors; and

It appearing that all of the allegations of the amended libel are true and that this Court has filed its opinion herein holding that claimant and respondent is liable to libelant on account of supplies furnished to said vessel, as set forth in the amended libel; and

It further appearing from the agreed statement of facts on file herein that on July 5, 1912, at Oleum, California, libelant furnished to respondent vessel three thousand five hundred (3,500) feet of dunnage of the value of forty-three and [21] 75/100 (43.75) dollars, and on July 24, 1912, at Balboa,

Canal Zone, libelant furnished seven hundred and seven and $78/100$ (707.78) barrels of fuel oil of the value of nine hundred and ninety-seven and $23/100$ (997.23) dollars to respondent vessel, and on August 5, 1912, at Balboa, Canal Zone, libelant furnished three hundred and fifteen and $34/100$ (315.34) barrels of fuel oil of the value of three hundred and ninety-four and $18/100$ (394.18) dollars to respondent vessel, and on August 31, 1912, at San Francisco, California, libelant furnished two thousand nine hundred and fifty-nine and $13/100$ (2,959.13) barrels of fuel oil of the value of one thousand nine hundred and twenty-three and $44/100$ (1,923.44) dollars to respondent vessel, and on November 27, 1912, at Balboa, Canal Zone, libelant furnished nine hundred and ninety-nine and $37/100$ (999.37) barrels of fuel oil of the value of one thousand two hundred and forty-nine and $21/100$ (1,249.21) dollars to respondent vessel;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Union Oil Company of California, libelant herein, do have and recover against American steamship "Portland," her engines, boats, tackle, apparel and furniture, etc., the sum of forty-three and $75/100$ (43.75) dollars, together with interest thereon at the rate of seven (7) per cent per annum from the 5th day of July, 1912, until paid; the sum of nine hundred and ninety-seven and $23/100$ (997.23) dollars, together with interest thereon at the rate of seven (7) per cent. per annum from the 24th day of July, 1912, until paid; the sum of three hundred and ninety-four and

18/100 (394.18) dollars, together with interest thereon at the rate of seven (7) per cent per annum from the 5th day of August, 1912, until paid; the sum of [22] one thousand nine hundred and twenty-three and 44/100 (1,923.44) dollars, together with interest thereon at the rate of seven (7) per cent per annum from the 31st day of August, 1912, until paid; and the sum of one thousand two hundred and forty-nine and 21/100 (1,249.21) dollars, together with interest thereon at the rate of seven (7) per cent per annum from the 27th day of November, 1912, until paid; together with its costs to be hereinafter taxed; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that unless an appeal be taken from this decree within the time provided for by the rules and practice of this court, the stipulators for costs and value on the part of claimant of said American steamship "Portland" shall cause the engagements of their said stipulations to be performed or show cause within four (4) days after the expiration of the time provided by the rules and practice of this court within which to appeal why execution should not issue against their goods, chattels and lands for the amounts, together with interest thereon, set forth in this decree.

Dated May 25, 1920.

M. T. DOOLING,
District Judge.

[Endorsed]: Receipt of a copy of the within Decree is hereby admitted this 19th day of May, 1920.

ANDROS & HENGSTLER,
Proctors for Respondent.

Filed May 25, 1920. W. B. Maling, Clerk. By
C. W. Calbreath, Deputy Clerk.

Entered in Vol. 10, Judg. and Decrees, at page 7.
[23]

In the Southern Division of the United States
District Court, for the Northern District of
California, First Division.

IN ADMIRALTY—No. 15,370.

UNION OIL COMPANY OF CALIFORNIA, a
Corporation,

Libelant,

vs.

The Steamship "PORTLAND," etc.,

Respondent.

Notice of Appeal (August 10, 1920).

To Union Oil Company of California, and to Messrs.
McCutchen, Willard, Mannon & Greene, its
Proctors:

You and each of you will please take notice that the
claimant of the said American steamship "Port-
land" hereby appeals to the United States Circuit
Court of Appeals for the Ninth Circuit from the final
decree made and entered herein on the 25th day of
May, 1920, and the whole thereof.

Dated, San Francisco, California, August 10, 1920.

ANDROS & HENGSTLER,

LOUIS T. HENGSTLER,

Proctors for Claimant and Appellant.

[Endorsed]: Due service and receipt of a copy of the within Notice of Appeal is hereby admitted this 10th day of August, 1920.

McCUTCHEM, WILLARD, MANNON &
GREENE,

Proctors for Libelant.

Filed Aug. 10, 1920. W. B. Maling, Clerk. By C.
W. Calbreath, Deputy Clerk. [24]

In the Southern Division of the United States
District Court, for the Northern District of
California, First Division.

IN ADMIRALTY—No. 15,370.

UNION OIL COMPANY OF CALIFORNIA, a
Corporation,

Libelant,

vs.

The Steamship "PORTLAND," etc.,

Respondent.

Assignment of Errors.

Claimant assigns errors in the proceedings of the
District Court as follows:

I.

The District Court erred in finding and holding
that all of the allegations of the amended libel are
true.

II.

The District Court erred in holding and deciding
that claimant and respondent is liable to libelant on

account of supplies furnished to said vessel as set forth in the amended libel.

III.

The District Court erred in that it did not hold and decide that claimant and respondent is not liable to libelant on account of the supplies furnished to said vessel as set forth in said amended libel.

IV.

The District Court erred in ordering, adjudging and decreeing that libelant should recover against said Amended Steamship "Portland," her engines, boats, tackle, apparel and furniture, etc., the principal sums in said final decree set forth and amounting in the aggregate to the sum of Four Thousand Six Hundred and Seven and 81/100 dollars (\$4,607.81) or any other [25] sum whatever.

V.

The District Court erred in ordering, adjudging and decreeing that libelant should recover against said American steamship "Portland," her engines, boats, tackles, apparel and furniture, etc., the interest in said final decree set forth, or any other interest whatever.

VI.

The District Court erred in ordering, adjudging and decreeing that libelant should recover against said American steamship "Portland," her engines, boats, tackle, apparel and furniture, etc., its costs incurred in said action.

VII.

The District Court erred in that it did not make a

decree dismissing said amended libel, with the costs of the District Court.

ANDROS & HENGSTLER,
LOUIS T. HENGSTLER,
Proctors for Claimant and Appellant.

[Endorsed]: Due service and receipt of a copy of the within assignments of error is hereby admitted this 10th day of August, 1920.

McCUTCHEN, WILLARD, MANNON &
GREENE,

Proctors for Libelant.

Filed Aug. 10, 1920. W. B. Maling, Clerk. By
C. W. Calbreath, Deputy Clerk. [26]

In the Southern Division of the United States
District Court, for the Northern District of
California, First Division.

IN ADMIRALTY—No. 15,370.

UNION OIL COMPANY OF CALIFORNIA, a
Corporation,

Libelant,

vs.

The Steamship "PORTLAND," etc.,

Respondent.

Notice of Appeal (November 19, 1920).

To Union Oil Company of California and to Messrs.
McCutchen, Willard, Mannon & Greene, Its
Proctors:

You, and each of you, will please take notice that

the claimant of the above-named American steamship "Portland," and National Surety Company, a Corporation, her stipulator for release, hereby appeal to the United States Circuit Court of Appeals for **the** Ninth Circuit, from the final decree made and entered herein on the 25th day of May, 1920, and the whole thereof.

Dated: San Francisco, California, November 19, 1920.

ANDROS & HENGSTLER,
LOUIS T. HENGSTLER,

Proctors for Claimant and National Surety Company, Appellants. [27]

Stipulation Re Filing Notice of Appeal.

IT IS HEREBY STIPULATED that the foregoing notice of appeal may be filed in the place and stead of the notice of appeal heretofore filed on the 10th day of August, 1920.

Dated; November 19, 1920.

McCUTCHEN, WILLARD, MANNON &
GREENE,

Proctors for Libellant.

ANDROS & HENGSTLER,
LOUIS T. HENGSTLER,

Proctors for Claimant and National Surety Company, Appellants.

[Endorsed]: Receipt of a copy of the within notice of appeal and stipulation is hereby admitted this 19th day of Nov., 1920.

McCUTCHEN, WILLARD, MANNON &
GREENE,

Proctors for Libellant.

Filed Nov. 22, 1920. W. B. Maling, Clerk. By
C. M. Talyor, Deputy Clerk. [28]

In the Southern Division of the United States
District Court, for the Northern District of
California, First Division.

IN ADMIRALTY—No. 15,370.

UNION OIL COMPANY OF CALIFORNIA, a
Corporation,

Libelant,

vs.

The Steamship "PORTLAND," etc.,

Respondent.

Supersedeas Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS:
That National Surety Company, a corporation, duly
organized and existing under and by virtue of the
laws of the State of New York, and licensed to do a
general surety business in the State of California,
as surety, is held and firmly bound unto the libelant
in the above-entitled cause in the sum of Ten Thou-
sand (\$10,000) Dollars to be paid to the said obligee
to which payment, well and truly to be made, it
hereby binds itself by these presents, signed, sealed
and dated at San Francisco, this 20th day of August,
1920.

The condition of the foregoing obligation is such
that whereas claimant has appealed to the U. S. Cir-
cuit Court of Appeals for the Ninth Circuit to re-

verse the decree, and the whole thereof, heretofore entered on the 25th day of May, 1920, in the Southern Division of the United States District Court for the Northern District of California, First Division, in Admiralty, in the above-entitled action, which decree was rendered in favor of the libelant therein, for the sum of \$43.75, together with interest thereon at the rate of seven per cent per annum from the 5th day of July, 1912, until paid; the sum of \$997.23 together with interest thereon at the rate of seven per cent per annum from the 24th day of July, 1912, until paid; the sum [29] of \$394.18, together with interest thereon at the rate of seven per cent per annum from the 5th day of August, 1912, until paid; the sum of \$1,923.44, together with interest thereon at the rate of seven per cent per annum from the 31st day of August, 1912, until paid; and the sum of \$1,-249.21, together with interest thereon at the rate of seven per cent per annum from the 27th day of November, 1912, until paid; together with its costs.

NOW, THEREFORE, the condition of this obligation is such that if claimant shall prosecute such appeal to effect and answer all damages and costs if it shall fail to make good said appeal, then this obligation shall be void, but otherwise it shall remain in full force and effect.

NATIONAL SURETY COMPANY,

[Seal]

By FRANK H. POWERS,

Resident Vice-President.

By F. J. CRISP,

Resident Assistant Secretary.

The premium on this bond is \$100 per annum.

State of California,
City and County of San Francisco,—ss.

On this twentieth day of Aug., in the year one thousand nine hundred and twenty, before me, John McCallan, a notary public in and for the said City and County of San Francisco, residing therein, duly commissioned and sworn, personally appeared Frank H. Powers and F. J. Crisp, known to me to be the resident vice-president and resident assistant secretary, respectively, of the National Surety Company, the corporation described in and that executed the within instrument, and also known to me to be the persons who executed it on behalf of the corporation therein named, and they acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office in the city and county of San Francisco, the day and year in this certificate first above written.

[Seal]

JOHN McCALLAN,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Aug. 20, 1920. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [30]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,370.

UNION OIL COMPANY OF CALIFORNIA, a
Corporation,

Libelant,

vs.

The Steamship "PORTLAND," etc.,

Respondent.

Bond for Costs on Appeal.

KNOW ALL MEN BY THESE PRESENTS:

That National Surety Company, a corporation, duly organized and existing under and by virtue of the laws of the State of New York, and licensed to do a general surety business in the State of California, as surety, is held and firmly bound unto the libelant in the above-entitled cause in the sum of Two Hundred and Fifty (\$250) Dollars to be paid to the said obligee, to which payment well and truly to be made, it hereby binds itself firmly by these presents, signed, sealed and dated at San Francisco, this 20th day of August, 1920.

The condition of this obligation is such that whereas lately in the Southern Division of the United States District Court for the Northern District of California, First Division, in Admiralty, in the above-entitled cause, a decree was entered in favor of the above-named libelant, from which de-

cree claimant has appealed to the U. S. Circuit Court of Appeals for the Ninth Circuit.

NOW, THEREFORE, if said claimant as appellant shall prosecute its appeal to effect, and shall pay all costs on appeal if said appeal is not sustained, then this obligation shall be void, but otherwise to be and remain in full force and effect, and execution [31] to issue thereon for the amount of such costs not exceeding Two Hundred and Fifty (\$250) Dollars, at the instance of any person interested as aforesaid.

NATIONAL SURETY COMPANY.

[Seal]

By FRANK H. POWERS,
Resident Vice-President.

By F. J. CRISP,
Resident Assistant Secretary.

The premium on this bond is \$10 for the term thereof.

State of California,

City and County of San Francisco,—ss.

On this twentieth day of Aug., in the year one thousand nine hundred and twenty, before me, John McCallan, a notary public in and for the said City and County of San Francisco, residing herein, duly commissioned and sworn, personally appeared Frank H. Powers and F. J. Crisp, known to me to be the resident vice-president and resident assistant secretary, respectively, of the National Surety Company, the corporation described in, and that executed the within instrument, and also known to me to be the persons who executed it on behalf of the

corporation therein named, and they acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office in the City and County of San Francisco, the day and year in this certificate first above written.

[Seal]

JOHN McCALLAN,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Aug. 20, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [32]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,370.

UNION OIL COMPANY OF CALIFORNIA, a Corporation,

Libelant,

vs.

The Steamship "PORTLAND," etc.,

Respondent.

Notice of Filing Bond for Costs on Appeal and Bond Staying Execution on Appeal.

To the Libelant Above Named and to Messrs. McCutchen, Willard, Mannon & Greene, Its Proctors:

You, and each of you, will please take notice that claimant did on the 20th day of August, 1920, file

in the clerk's office of the above-entitled court its bond for costs on appeal and also its bond staying execution on appeal with National Surety Company, a corporation, as surety.

Yours, etc.,
ANDROS & HENGSTLER,
Proctors for Claimant.

[Endorsed]: Due service and receipt of a copy of the within notice of filing bonds is hereby admitted this 20th day of Aug., 1920.

McCUTCHEN, WILLARD, MANNON &
GREENE,

Proctors for Libelant.

Filed Aug. 20, 1920. W. B. Maling, Clerk. By
C. W. Calbreath, Deputy Clerk. [33]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,370.

The Steamship "PORTLAND," etc., and THE
NATIONAL SURETY COMPANY, a Corporation,

Respondents and Appellants,
vs.

UNION OIL COMPANY OF CALIFORNIA, a
Corporation,

Libelant and Appellees.

Citation on Appeal (Copy).

The United States of America,—ss.

The President of the United States to Union Oil Company of California, a Corporation, Libelant and Appellee, and to Messrs. McCutchen, Willard, Mannon & Greene, Its Proctors, GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, California, within thirty days from date hereof, pursuant to an appeal filed in the office of the Clerk of the Southern Division of the United States District Court for the Northern District of California, wherein the said steamship "Portland" and the National Surety Company, named in the decree in said appeal mentioned, are appellants and you, the said Union Oil Company of California, a corporation, are appellee, to show cause, if any there be, why said decree, signed, filed and entered on the 25th day of May, 1920, and mentioned in said appeal should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable FRANK H. RUDKIN, Judge of the District Court of the United States, Southern Division, Northern District [34] of California, this 24th day of November, A. D. 1920, and of the Independence of the United States the one hundred and forty-fifth year.

FRANK H. RUDKIN,
Judge of the United States District Court for the
Northern District of California.

[Endorsed]: Due service and receipt of a copy of the within citation on appeal is hereby admitted this 24th day of Nov., 1920.

McCUTCHEN, WILLARD, MANNON &
GREENE,

Proctors for Respondents and Appellants.

Filed Nov. 24, 1920. W. B. Maling, Clerk. By
C. M. Taylor, Deputy Clerk. [35]

**Certificate of Clerk U. S. District Court to Apostles
on Appeal.**

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 35 pages, numbered from 1 to 35, inclusive, contain a full, true, and correct transcript of certain records and proceedings, in the case of Union Oil Company of California, a Corporation, vs. The Steamship "Portland," etc., No. 15,370, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the instructions of the proctors for claimant and appellant herein.

I further certify that the cost for preparing and certifying the foregoing Apostles on Appeal is the sum of twelve dollars and twenty cents (\$12.20), and that the same has been paid to me by the proctors for appellant herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court,

this 13th day of December, A. D. 1920,

[Seal]

WALTER B. MALING,
Clerk.

By C. M. Taylor,
Deputy Clerk. [36]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,370.

The Steamship "PORTLAND," etc., and THE NATIONAL SURETY COMPANY, a Corporation,

Respondents and Appellants,

vs.

UNION OIL COMPANY OF CALIFORNIA, a Corporation,

Libelant and Appellees,

Citation on Appeal (Original).

The United States of America,—ss.

The President of the United States to Union Oil Company of California, a Corporation, Libelant and Appellee, and to Messrs. McCutchen, Willard, Mannon & Greene, Its Proctors,
GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, California, within thirty days from date

hereof, pursuant to an appeal filed in the office of the Clerk of the Southern Division of the United States District Court for the Northern District of California, wherein the said steamship "Portland" and the National Surety Company, named in the decree in said appeal mentioned, are appellants and you, the said Union Oil Company of California, a corporation, are appellee, to show cause, if any there be, why the said decree, signed, filed and entered on the 25th day of May, 1920, and mentioned in said appeal should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable FRANK H. RUDKIN, Judge of the District Court of the United States, Southern Division, Northern District [37] of California, this 24th day of November, A. D. 1920, and of the Independence of the United States the one hundred and forty-fifth year.

FRANK H. RUDKIN,
Judge of the United States District Court for the
Northern District of California. [38]

Due service and receipt of a copy of the within Citation on Appeal is hereby admitted this 24th day of Nov., 1920.

McCUTCHEN, WILLARD, MANNON &
GREENE,

Proctors for Respondents and Appellants.

[Endorsed]: No. 15,370. District Court of the United States for the Northern District of California, The Steamship "Portland," etc. and The National Surety Company, a Corporation, Respond-

ents and Appellants, vs. Union Oil Company of California, a Corporation, Libelant and Appellee. Citation on Appeal. Filed Nov. 24, 1920. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [39]

[Endorsed]: No. 3608. United States Circuit Court of Appeals for the Ninth Circuit. The Steamship "Portland," Her Engines, Boilers, Boats, Tackle, Apparel, Furniture and Appurtenances, and The National Surety Company, a Corporation, Appellants, vs. Union Oil Company of California, a Corporation, Appellee. Apostles on Appeal. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Filed December 13, 1920.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

S. S. "PORTLAND, Her Engines, etc.,
Appellant,

vs.

UNION OIL COMPANY OF CALIFORNIA, a
Corporation,

Appellee.

Order Extending Time to and Including October 9, 1920, Within Which to File Record and Docket Cause.

GOOD CAUSE APPEARING THEREFOR, IT IS HEREBY ORDERED that the time of plaintiff above named within which to print the record and file and docket this cause on appeal in the United States Circuit Court of Appeals for the Ninth Circuit be, and the same is, hereby extended to and including the 9th day of October, 1920.

WM. W. MORROW,

Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: 3608. In the United States Circuit Court of Appeals, for the Ninth Circuit. S. S. "Portland," Her Engines, Appellant, vs. Union Oil Company of California, a Corporation, Appellee. Order Extending Time to and Including October 9, 1920, Within Which to File Record and Docket Cause. Filed Sep. 8, 1920. F. D. Monckton, Clerk. Re-filed Dec. 13, 1920. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

S. S. "PORTLAND," Her Engines, etc.,
Appellant,

vs.

UNION OIL COMPANY OF CALIFORNIA, a
Corporation,

Appellee.

**Order Extending Time to and Including November 9,
1920, Within Which to File Record and Docket
Cause.**

GOOD CAUSE APPEARING THEREFOR,
IT IS HEREBY ORDERED that the time of
plaintiff above named within which to print the
record and file and docket this cause on appeal in
the United States Circuit Court of Appeals for the
Ninth Circuit be, and the same is hereby extended
to and including the 9th day of November, 1920.

WM. W. MORROW,

Judge of the United States Circuit Court of Ap-
peals for the Ninth Circuit.

[Endorsed]: 3608. In the United States Circuit
Court of Appeals, for the Ninth Circuit. S. S.
"Portland," Her Engines, etc., Appellant vs. Union
Oil Company of California, a Corporation, Ap-
pellee. Order Extending Time to and Including
November 9, 1920, Within Which to File Record
and Docket Cause. Filed Oct. 7, 1920. F. D.
Monckton, Clerk. Re-filed Dec. 13, 1920. F. D.
Monckton, Clerk.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

No. —.

S. S. "PORTLAND," Her Engines, etc.,
Appellant,

vs.

UNION OIL COMPANY OF CALIFORNIA, a
Corporation,

Appellee.

**Order Extending Time to and Including December 5,
1920, Within Which to File Record and Docket
Cause.**

GOOD CAUSE APPEARING THEREFOR,
IT IS HEREBY ORDERED that the time of
plaintiff above named within which to print the
record and file and docket this cause on appeal in
the United States Circuit Court of Appeals for the
Ninth Circuit, be, and the same is, hereby extended
to and including the 5th day of December, 1920.

W. H. HUNT,

Judge of the United States Circuit Court of Ap-
peals for the Ninth Circuit.

[Endorsed]: 3608. In the United States Circuit
Court of Appeals, for the Ninth Circuit. S. S.
"Portland," Her Engines, etc., Appellant vs. Union
Oil Company of California, a Corporation, Ap-
pellee. Order Extending Time to and Including
December 5, 1920, Within Which to File Record
and Docket Cause. Filed Nov. 9, 1920. F. D.
Monckton, Clerk. Re-filed Dec. 13, 1920. F. D.
Monckton, Clerk.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

No. —.

The Steamship "PORTLAND," etc.,
Appellant,

vs.

UNION OIL COMPANY OF CALIFORNIA, a
Corporation,

Appellee.

Order Extending Time of Appellant to and Including January 10, 1921, Within Which to Print the Apostles on Appeal and File and Docket This Cause on Appeal.

GOOD CAUSE APPEARING THEREFOR,
IT IS HEREBY ORDERED that the time of
appellant above named within which to print the
apostles on appeal and file and docket this cause on
appeal in the United States Circuit Court of Ap-
peals, for the Ninth Circuit be, and the same is,
hereby extended to and including the 8th day of
January, 1921.

WM. H. HUNT,

Judge of the United States Circuit Court of Ap-
peals for the Ninth Circuit.

[Endorsed]: No. 3608. In the United States Cir-
cuit Court of Appeals for the Ninth Circuit. The
Steamship "Portland," etc., Appellant, vs. Union
Oil Company of California, a Corporation, Ap-
pellee. Order Extending Time of Appellant to File
Record and Docket Cause. Filed Dec. 9, 1920. F.
D. Monckton, Clerk. Refiled Dec. 13, 1920. F. D.
Monckton, Clerk.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

UNION OIL COMPANY OF CALIFORNIA,

Libelant,

vs.

S. S. "PORTLAND,"

Respondent.

Stipulation Re Charter-party.

IT IS HEREBY STIPULATED by the parties hereto that the annexed is a true copy of the charter-party referred to in Article 11 of the "Memorandum for Stipulation of Facts" on file herein, and that the same may be incorporated in the Apostles on Appeal and used by the parties and the Court as one of the facts upon which the cause is submitted for decision.

McCUTCHEN, WILLARD, MANNON &
GREENE,

Proctors for Libelant.

ANDROS & HENGSTLER,

Proctors for Respondent.

COPY.

CHARTER-PARTY.

THIS CHARTER-PARTY, made and concluded upon in San Francisco, the 28th day of August, 1911, between C. W. Wiley, agents for owners of the good American Screw Steamship Portland of New York of 2286 tons gross register, and 1587 tons net register, and California-Atlantic S. S. Co., Charterers, of the City of San Francisco.

WITNESSETH: That the former party agree to let, and the latter agree to hire the said steamship Portland for the term of Twenty-four (24) calendar months certain, the charterers having the option of continuing the Charter for any further period of twenty-four (24) calendar months more, at the option of the Charterers, they giving the Owners four (4) months' notice previous to redelivery of the vessel. The hire to commence from the day on which she is delivered or placed at the disposal of the Charterers (but not before September 1st) at New York, N. Y., in such dock or such safe wharf or place (where she may always safely lie afloat) and as Charterers may *direct*, she being then ready with clear holds, tight, staunch, strong and having been newly painted and every way fitted for the service (and with full complement of officers, seamen, engineers and firemen for a vessel of her tonnage): to be employed in such lawful trades as Charterers or their Agents shall direct from New York to San Francisco and return, via Straits of Magellan, and to operate on the Pacific Coast not north of Comox, nor south of Panama, on the following conditions:

Owners to install oil burners, together with necessary piping and tanks with a capacity of 3,600 barrels of fuel oil, all in accordance with the requirements of the U. S. Inspection Laws and at their expense, and if charterers fail to avail themselves of the option of the two years renewal, then charterers are to pay the owners \$2,500.00 in U. S. gold coin as their portion of the cost of conversion into an oil burner.

1. That the owners shall provide and pay for all provisions, water, wages and Consular shipping and discharging fees of the captain, officers, engineers, firemen and crew; shall pay for the insurance of the vessel, also for all the cabin, deck, engine-room and other necessary stores, and shall maintain her in a thoroughly efficient state in hull and machinery for and during the service.

2. That the Charterers shall provide and pay for all the fuel, port charges, pilotages, agencies, commissions, Consular charges (except those pertaining to the captain, officers or crew), and all other charges whatsoever, except those before stated or hereafter provided to be paid by the Owners.

3. That the Charterers shall accept and pay at once on delivery of steamer for all fuel in the steamer's bunkers or tanks on delivery, and the Owners shall, on expiration of this Charter-party, pay for all fuel left in the bunkers or tanks, each at the current market prices at the respective ports where she is delivered to them, respectively.

4. That the charterers shall pay for the use and hire of the said vessel two hundred and twenty-five (\$225.00) dollars U. S. gold coin, per running day, commencing on and from the day of her delivery as aforesaid, and at and after the same rate for any part of a month; hire to continue until her delivery, with clean holds to the Owners (unless lost) at New York, N. Y., or San Francisco, California, at the option of the Owners, they giving the Charterers at least four months' notice prior to the expiration of this charter.

5. That should the steamer be on her voyage towards the port of return delivery at the time a payment of hire becomes due, said payment shall be made for such a length of time as the Owners or their agents and Charterers or their agents may agree upon as the estimated time necessary to complete the voyage, but Charterers shall be allowed to retain sufficient sum to cover estimated amount of disbursements and value of coal that will be left in bunkers and when the steamer is delivered to Owners or their agents any difference shall be refunded by steamer or paid by Charterers as the case may require.

6. Payment of said hire to be made in cash as follows: Two thousand dollars (\$2,000.00) upon the signing of this charter party, four thousand, seven hundred and fifty dollars (\$4,750.00) upon the day of the ship's delivery to charterers to cover 30 days in advance and at the expiration of said thirty days Charterers to pay another thirty days' hire in advance and so on throughout the term of this charter. Payments to be made at Seattle, Washington, or New York, N. Y., as Owners may direct and in default of such payment or payments as herein specified the Owners shall have the faculty of withdrawing the said steamer from the service of the Charterers without prejudice to any claim they, the Owners, may otherwise have on the Charterers, in pursuance of this charter.

8. That the cargo or cargoes shall be laden and/or discharged in any dock or at any wharf or place that the Charterers or their agents may direct, but

the steamer shall not be bound to lie at any wharf or place where she cannot safely be afloat at any state of the tide.

9. That the whole reach of the vessel's holds, decks, and usual places of loading and accommodation of the ship (not more than she can reasonably stow and carry), shall be at the Charterer's disposal, reserving only proper and sufficient space for ship's officers, crew, tackle, apparel, furniture, provisions, stores and fuel.

10. That the captain shall prosecute his voyages with the utmost dispatch, and shall render all customary assistance with ship's crew, tackle and boats. That the captain (although appointed by the Owners) shall be under the orders and direction of the Charterers as regards employment, agency or other arrangements; and the Charterers hereby agree to indemnify the Owners from all consequences or liabilities that may arise from the captain signing bills of lading or otherwise complying with the same, when and as requested by the Charterers.

11. That if the Charterers shall have reason to be dissatisfied with the conduct of the captain, officers or engineers, the owners shall, on receiving particulars of the complaint, investigate and the same, and if necessary, make a change in the appointments.

12. That the Charterers shall have permission to appoint one supercargoes, who shall accompany the steamer during her voyage, and be furnished by the Owners, free of charge, with first-class accommodation and same fare as provided for captain's table.

13. That the master shall be furnished from time

to time with all requisite instructions and sailing directions, and he shall keep a full and correct deck and engine log of the voyage or voyages, which are to be patent to Charterers or their agents, and shall furnish the Charterers, their agent, or supercargo, when required, with a true daily copy of the logs, showing the course of the steamer and distance run, and the consumption of fuel and shall take every advantage of wind by using the sails (if any on board) with a view to economize the expenditure of fuel.

14. That the master shall use all diligence in caring for the ventilation of the cargo.

15. That in the event of the loss of time from deficiency of men or stores, breakdown of machinery, stranding, fire or damage preventing the working of the vessel for more than twenty-four running hours, the payment of the hire shall cease until she be again in an efficient state to resume her service at such place or position where the payment of hire ceased, and should the vessel in consequence of any of the matters aforesaid put into any port, other than that to which she is bound, the port charges, pilotages and other expenses at such port shall be borne by the steamer's Owners, but should the vessel be driven into port or to anchorage by stress of weather or from any accident to the cargo, such detention or loss of time shall be at the Charterers' risk and expense.

16. That should the vessel be lost, any hire paid in advance and not earned (reckoning from the date

of her last being heard of) shall be returned to the Charterers.

17. The act of God, enemies, fire, restraint of princes, rulers and people and all dangers and accidents of the seas, rivers, machinery, boilers and steam navigation and errors of navigation throughout this charter-party always mutually to be excepted, but it is mutually agreed that this charter is subject to all the terms and provisions of and exemptions from liability contained in the act of Congress of the U. S. of America, approved on the thirteenth day of February, 1893, and entitled "An Act relating to navigation of vessels, etc." (Harter Act).

18. Should any dispute arise between the Owners and the Charterers, the matter in dispute shall be referred to one person in San Francisco, one from Seattle, one to be appointed by each of the parties hereto, and in case they cannot agree parties so appointed to appoint a third.

19. That the Owners shall have a lien upon all cargoes and all sub-freights, for any amounts due under this charter, and the Charterers shall have a lien on the ship for all moneys paid in advance and not earned.

21. That as the steamer may be from time to time employed in tropical waters during the term of this charter, steamer is to be docked, bottom cleaned and painted whenever Charterers and master think necessary, but, at least once every six months, and payment of the hire to be suspended until she is again in proper state for the service at the place where the hire was suspended. The ex-

pense incurred in docking, cleaning and painting shall be borne by the Owners, provided suitable dry-dock is available at the ports to which she may be ordered.

22. The steamer to be docked and painted immediately before delivery to Charterers under this charter.

23. That the Owners shall provide ropes, falls, slings and blocks, including necessary wire net slings 8'x8' for loading or discharging general cargo, also all necessary gear to handle ordinary cargo up to three tons (of 2240 pounds each) in weight, also lanterns for night work, and rain tents as customary at Balboa.

24. Steamer to work night and day if required by Charterers and all steam winches to be at Charterers' disposal during loading and discharging, and steamer to provide men to work same both day and night as required, Charterers agreeing to pay extra expense, if any, incurred by reason of night work, at the current local rate.

24½. It being expressly agreed that such winchman so provided shall while so employed be under the exclusive control and direction of the charterers or their agents and be considered their servants and Charterers agree to indemnify and save harmless the owners and said vessel from the consequences and liabilities that may arise from the acts of such men while so employed.

25. That all derelicts and salvage shall be for Owners' and Charterers' equal benefit. Should the vessel be put into a port of distress or be under av-

erage, she shall be consigned to Owners or their agents, the Owners paying the usual charges and commissions, and in case an average statement shall be required, the same shall be made by adjusters mutually agreeable to both parties who are to attend to the settlement and collection of the average, and to be paid the customary charges. General average, if any, shall be adjusted according to York-Antwerp Rules, 1890.

26. Should steamer not be ready for delivery at port of delivery on or before September 30th, 1911, Charterers or their agents to have the option of canceling this charter at any time not later than the day of steamer's readiness.

26½. That in event of the steamer not making her canceling date, any money or moneys paid by the Charterers on account of hire to be refunded.

27. That the Charterers shall assume, and hold the Owners harmless from any and all charges for brokerage or commissions connected with this charter should any claims be made.

28. Penalty for nonperformance of this contract, estimated amount of damages.

29. If the ship is employed in any business not permitted by the ordinary marine insurance, the charterers shall pay the extra expense of the insurance which the Owners may hereby incur. In case the ship is employed by the charterers in any business whereby it shall be deemed necessary by the Owners to obtain war risk insurance the additional expense of war risk insurance shall be borne and paid by the charterers.

30. In the event of any claim against Charterers by owners for any loss or injury to the said steamer or death or injury to any of her crew, Charterers to have benefit of any insurance insuring owners against such loss in reduction of the said claim.

Signed:

PORTLAND, INC.

C. W. WILEY,

Agent.

CALIFORNIA ATLANTIC S. S. CO.

By A. S. CHESEBROUGH,

President.

Witness:

J. D. AMOS.

[Endorsed]: No. 3608. In the United States Circuit Court of Appeals for the Ninth Circuit. Union Oil Company of California, Libellant, vs. S. S. "Portland," Respondent. Stipulation Re Charter-party. Filed Dec. 23, 1920. F. D. Monekton, Clerk. By Paul P. O'Brien, Deputy Clerk.

No. 3608

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE STEAMSHIP "PORTLAND", her engines,
boilers, boats, tackle, apparel, furniture
and appurtenances, and THE NATIONAL
SURETY COMPANY (a corporation),

Appellants,

VS.

UNION OIL COMPANY OF CALIFORNIA
(a corporation),

Appellee.

BRIEF FOR APPELLANTS.

Upon Appeal from the Southern Division of the United States District
Court for the Northern District of California,
First Division.

ANDROS & HENGSTLER,

LOUIS T. HENGSTLER,

Proctors for Appellants.

Synopsis.

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Upon Appeal from the Southern Division of the United States District
Court for the Northern District of California,
First Division.

I. Statement of the Case.

A. THE FACTS.

The facts appear in the pleadings and stipulations on file.

In 1911 California-Atlantic Steamship Company maintained a service as common carrier of merchandise

between the Pacific and Atlantic coasts, by way of the Panama Canal, operating a number of chartered vessels in said service. On April 18, 1911, this Steamship Company made a contract with libelant, agreeing to use oil as fuel, and to purchase from libelant all the oil required, in the operation of steamers then under charter and of all other steamers which it should thereafter charter for said service, and libelant agreed reciprocally to sell and deliver to the said charterers the oil so required by them (17-18).

Between April 18, 1911, and August 28, 1911, a representative of libelant informed a representative of the Steamship Company verbally that thereafter it would be necessary to charge any oil furnished to the vessels mentioned in said contract to the vessels, to which the representative of the charterer consented.

On August 28, 1911, the Steamship Company chartered the steamship "*Portland*", under a time charter in government form. The charter-party, in conformity with the oil agreement between libelant and charterer, required the owners of the steamship to convert her into an oil burner (47). She was so converted, and thereafter oil was furnished by libelant to the "*Portland*" under the agreement of April 18, 1911, with the charterer; the bills delivered to the charterer were made out, as follows: "S. S. Portland and Charterer to Union Oil Company of California, Dr.," and all the bills for oil so furnished to the charterer between August 28, 1911, and July 5, 1912, were presented to and paid by California-Atlantic Steamship Company, charterer.

During this period libelant knew that the "*Portland*" was under time charter and knew, from the fact that charterer was purchasing the oil for the "*Portland*" under its oil agreement, that the "*Portland*" charter was not within the class of charters excepted in the oil agreement, but that the charterer, by its contract with the owner of the vessel, was obligated to procure and pay for the oil.

Between July 5, 1912, and November 27, 1912, libelant made five deliveries under its contract, for which it could not collect its bills from the charterer. The first two defaults in payment occurred in July; in spite of these defaults libelant made two further deliveries in August, for which the charterer again defaulted. In spite of these four defaults a further delivery was made three months after the fourth default, on November 27, 1912.

After failing to collect the payment for the five deliveries of oil from the charterer, libelant finally, on January 29, 1913, filed a libel in rem against the vessel.

B. THE QUESTION INVOLVED.

Libelant contends: That it has a maritime lien upon the steamer "*Portland*" for the oil furnished.

Claimant contends: That libelant has no lien upon the steamer, and that neither the steamer nor her owners are liable for the oil furnished.

C. ERROR RELIED UPON BY APPELLANT.

That the district court decreed that the steamer and her *owners are liable* for the value of the oil furnished.

II. Brief of the Argument.

FIRST. LIBELANT HAS NOT SHOWN THAT THE OIL WAS PROCURED BY THE OWNER OR A PERSON AUTHORIZED BY THE OWNER TO PROCURE IT. THE FACTS SHOW, ON THE CONTRARY, THAT THE OIL WAS PROCURED BY THE TIME CHARTERER, UNDER A PERSONAL CONTRACT OBLIGATING LIBELANT TO FURNISH THE SAME.

1. Libelant, claiming a lien against the steamship "*Portland*" under the Act of June 23, 1910, has the burden of proving that the oil was procured by the owner of the vessel or by a person authorized by the owner.

The vessel was under time charter. The owner, under this contract, received his hire, whether the charterer chose to use her in navigation or to lay her up for lack of fuel. *The owner was, therefore, not interested in her fuel supply.* The charterer was obligated to *provide* for all the fuel that she might require, and to pay for the same (48).

2. To provide for the fuel oil for this vessel, and the other vessels of its line, the charterer had made a general oil contract with libelant, whereby the charterer was obligated to purchase all its oil for this vessel from libelant, and libelant was obligated to sell and deliver to charterer all the oil required in her operation (18).

The oil was, therefore, actually furnished to the "*Portland*" by the libelant upon the procurement of the charterer, and not of the owner.

3. The libel alleges that the oil was "furnished by order of the master and charterer"; the answer denies that the oil was furnished by order of the master. The stipulation reads that the oil was furnished "upon orders *from* the master". It appears, therefore, that the oil in suit was furnished to the vessel "by order of the charterer, upon orders from the master".

It is also stipulated that the oil "was furnished *under the conditions* specified" in the oil contract between libelant and charterer (20); it follows that it was furnished *to the party to said contract*, viz., the charterer. The proof, therefore, shows that the oil was furnished *to the charterer, under the oil agreement*, "upon orders from the master". The orders came, of course, in any specific case, "from the master"; for he determined, under the charter-party, the amount of oil necessary for the voyage designated by the charterer. In this sense the oil furnished by libelant to the charterer, under contract, was based "upon orders from the master"; but it was *procured* from the furnisher by the charterer under its general blanket contract.

4. The oil having been procured by the charterer, in accordance with its obligations both to the owner of the vessel under the charter-party, and to libelant under the previous general oil contract, it follows that the oil was *not* procured by either the owner or a person authorized by the owner. The charterer had no actual

authority from the owner; nor does the statute give to the charterer presumed authority to bind the owner or the vessel.

The charter-party gave the charterer no right to impose a lien upon the vessel for fuel to be furnished to her; for, in the first place, the charter obligation to provide the fuel was upon the charterer, and, in the second place, the only lien upon the vessel given to the charterer by the charter-party was a lien for moneys advanced and not earned (Clause 19 of Charter-party, Apostles p. 52).

5. Nor had libelant a right to presume that the person ordering the oil had authority to bind the vessel for the supplies. On the contrary, libelant knew (I) that the "*Portland*" was under time charter and used by charterer in a regular line of steamships; (II) that her owner was not interested in her navigation or fuel supply; (III) that the charterer was obliged, under the charter-party, to procure the oil and to pay for it; (IV) that the charterer had accordingly made a contract with libelant for such supply; (V) that under this contract supplies had been ordered and paid by the charterer for many months; (VI) that if, under this contract, the charterer should be in default in payments for oil, the libelant had easy and certain remedies agreed upon between libelant and charterer, whereby it could protect itself against every one of the losses subsequent to the first default, or practically against all loss.

The furnisher knew that, because of the terms of the charter-party, and for other reasons, the person ordering the supplies was without authority to bind the vessel; and knew that, because of the terms of the general oil agreement with the charterer, the person ordering oil for the "*Portland*" was ordering it for the charterer personally.

6. If libelant did not actually know all these circumstances, it could easily have ascertained each and every one of them. Knowing that it was dealing with a charterer, it was put upon inquiry as to the terms of the charter and was bound thereby. The charterer, and the terms of the charter-party, were within easy reach of libelant; if the oil contract with the charterer, and the fact that the charterer purchased and paid for the oil under it were not sufficient notice to the libelant, it could have ascertained by asking the charterer, that the charter-party required the charterer to pay for the oil furnished to the "*Portland*".

Curacao Trading Co. v. Bjorge, 263 Fed. 693
(March, 1920);

The Oceana, 233 Fed. 139; affirmed 244 Fed. 80;

The Hatteras, 255 Fed. 518;

The Penn, 266 Fed. 933 (July, 1920);

The Castor, 267 Fed. 608 (July, 1920).

In *Curacao Trading Co. v. Bjorge*, 263 Fed. 693, the Circuit Court of Appeals for the Fifth Circuit held that

“A steamship, under time charter requiring charterers to furnish and pay for coal, and *containing no provision respecting their subjecting the vessel to liens*, is not subject to lien under Act June 23,

1920, for coal furnished in a foreign port on the order and credit of charterer under a prior contract with the furnisher.

In *The Oceana*, 233 Fed. 139, it is held that

“The phrase ‘knew, or by the exercise of reasonable diligence could have ascertained’ * * * was used in the Act of Congress to make it clear that, *if the furnisher knew of the existence of a charter-party, * * * he is put upon inquiry as to its terms, and cannot excuse himself by denying ignorance of the terms, should it turn out that the charterer * * * had undertaken to furnish the vessel at his own cost.*”

In *The Castor*, 267 Fed. 608 (July, 1920), it is likewise held that

Where the person supplying necessities *has knowledge that he is dealing with a charterer*, he is put upon inquiry as to the terms of the charter.

In *The Penn*, 266 Fed. 933, the District Court says:

“It does appear, however, that Mr. Guy, the superintendent of the libelant company, knew that the vessel was chartered by a company that was running a line * * * The knowledge on the part of Mr. Guy was sufficient to put the libelant on inquiry as to the existence and to the terms of the charter-party, but the libelant failed to make any inquiry and * * * supplied the material without any inquiry whatever. Having, therefore, been put upon inquiry and failing to make the necessary inquiries, the libelant did not acquire a lien against the vessel.”

See, also, *The Mary A. Tryon*, 93 Fed. 220.

In the instant case libelant had been dealing with the charterer before it had any dealings with the “Port-

land” and had a contract with the charterer whereby the latter was bound to purchase its oil requirements for the “*Portland*” from the libelant and to make payment in the agreed terms; under this contract libelant had dealt with the charterer and had furnished oil to the “*Portland*” for many months and had been paid therefor by the charterer. All these dealings were profitably carried on, on the personal credit of the charterer, at the prices and under the conditions of the oil agreement between charterer and libelant.

Assuming that the master did place the orders for the oil requirements directly into the hands of the libelant, which does not appear as a fact, the libelant knew that the order referred to, and was placed under, the oil contract which libelant had made with the charterer, and libelant, in accepting the order, looked to the charterer for the payment of the oil; in other words, the master acted in the transaction as the charterer’s agent, and libelant so understood. The charterer having no authority to bind the vessel, its agent had no such authority.

When the charterer bound itself, in its contract with libelant, “to purchase from libelant all oil required in the operation” of the “*Portland*”, the charterer legally “procured” all oil so required; and the libelant thereby contracted to furnish all the oil required in the operation of the steamship upon the order of the charterer. The real order for all oil to be furnished to the “*Portland*” was the *orders of the charterer*, as a party to the oil contract; it is a stipulated fact that all the oil in fact furnished to her was furnished under the

conditions of said contract. It follows that the oil in suit was furnished to the charterer *upon the order of the charterer*, under the conditions of the contract and in pursuance of libelant's legal obligations to the charterer. Assuming, without granting, that the specific "orders from the master", upon which the five installments were furnished by libelant, were transmitted to libelant directly by the master, they were nevertheless mere items of the general order of the charterer, whereby the charterer procured all the oil required by the "*Portland*" under the oil contract.

Under clause 10 of the charter-party the master was "under the order and direction of the charterer"; under clause 13 he was made the responsible agent of the charterer with regard to consumption of fuel oil. *If* he told libelant directly how many barrels of fuel oil were required at stated times, he did so under the directions of the charterer, and as the charterer's agent. The libelant knew that the master, when he so ordered supplies, acted under the oil agreement with the charterer, and as the agent of the charterer. In the absence of any other facts, this knowledge prevents the operation of the presumption that the master had authority from the owner to procure the oil; for the latter presumption applies only in the absence of knowledge by the furnisher that the master is in fact acting as the agent for the charterer.

In addition to this the lien given by the Act is subject to the exception that no lien shall be conferred where "the furnisher knew, or by the exercise of reasonable diligence could have ascertained" that the person order-

ing was without authority to bind the vessel therefor. Now the facts show that the libelant knew, or by the exercise of reasonable diligence could have ascertained, that the charter-party required the *charterer* to pay for the fuel oil needed. The libelant had habitual experience with this time charterer; indeed "it is usual and customary for the charterer * * * to disburse the necessary expenses of the ship, and of this *all persons furnishing supplies, etc., to a chartered ship* must be deemed to have notice". (This Court, in *The South Coast*, 247 Fed. 84, 89.) And again the fact that the orders for the oil were placed on behalf of the "*Portland*", chartered by California Atlantic S. S. Co., was notice to the libelant that this vessel was under a charter bringing her within the necessary scope of the general oil agreement with the charterer, and imposing upon the charterer the duty to pay for the oil.

SECOND. DISTINCTION BETWEEN THE "SOUTH COAST" AND THE INSTANT CASE.

1. In the case of the "*South Coast*", 233 Fed. 327; 247 Fed. 84; 251 U. S. 519, upon which libelant has relied in the lower court, the *charter-party recognized that liens might be imposed by the charterer*:

"By reason of the provision that the charterer will hold the owner harmless from all liens against the vessel there is an implication of authority on the part of the *charterer* to incur such expenses on the credit of the vessel." (247 Fed. 89.)

"The charter-party recognizes that liens may be imposed by the charterer and allowed to stand for

less than a month, and there seems to be no sufficient reason for supposing the words not to refer to all the ordinary maritime liens recognized by the law.” (251 U. S. 523.)

In the instant case the charter-party does not recognize that liens might be imposed by the charterer for fuel oil furnished; on the contrary, the charter-party provides:

First. That the charterer shall provide and pay for all the fuel.

Second. That the charterer shall pay for the use of the vessel \$225 per running day, commencing on the day of her delivery to the charterer and continuing until her delivery back to the owners, regardless of whether the vessel moves or not, or whether she is supplied with fuel oil, or not.

Third. That the charterer can create only one lien, viz., “a lien on the ship for all moneys paid in advance and not earned”. These provisions in the charter-party negative the right of the charterer to impose any lien upon the vessel for the purpose of procuring fuel oil for its business.

See *Curacao Trading Co. v. Bjorge*, *supra*, where the Circuit Court of Appeals for the Fifth Circuit said, referring to the “*South Coast*”:

“The case cited is not authority for the proposition that a vessel may be subjected to a lien for the price or value of supplies furnished to a charterer who is without authority to bind the vessel or its owner therefor.”

2. In the "*South Coast*" case the charterers ordering the supplies were actually the owners of the vessel *pro hac vice* and had possession and full control of the vessel; hence an order from such charterers was equivalent to an order from the owner. In the instant case the charterer ordering the oil under its standing contract had *not* possession of the vessel (as libelant knew), and therefore had no presumptive right to pledge the vessel for the payment of the charterer's debts.

3. In the instant case the oil was furnished by libelant to the "*Portland*" under a standing contract with a well-known charterer, who ran an extensive line of steamships between Atlantic and Pacific ports, by the terms of which all the steamers of the charterer's line were supplied with fuel oil by the libelant in reliance upon the personal credit of the charterer for reimbursement for the deliveries made to the various steamers, whereas, in the "*South Coast*" case, there was no contract between the furnisher and the obscure charterers, but the furnishers, in voluntarily making the casual supplies, relied upon the credit of the vessel.

THIRD. THE ALLEGED AGREEMENT BETWEEN MR. KEOWN AND MR. CHESEBROUGH.

After the oil contract had been made between libelant and charterer, and before the "*Portland*" was added by the charterer to its fleet of chartered steamers, Mr. Keown, representing the libelant, told Mr.

Chesebrough, representing the charterer, that thereafter it would be necessary "to charge any oil and dunnage furnished to the vessel mentioned" in the contract "to the vessels. Mr. Chesebrough consented thereto".

Libelant relies upon these facts for the purpose of supporting its alleged lien upon the "*Portland*".

Assuming that the conversation with Mr. Chesebrough was a sufficient consent of the charterer, it is respectfully submitted that this alleged agreement had no binding force even as against the charterer, much less against the owner, for the following reasons:

(I) Such an agreement, to be binding, must be in writing. Libelant claims its efficiency during a period beginning at the date of conversation and continuing to November 27, 1912,—a period of considerably more than one year. Not being in writing, the agreement is invalid as between the parties thereto (Civil Code of California, par. 1624, subd. 1).

(II) The alleged agreement is without consideration: Under the previous written contract libelant was obligated to sell to the charterer all the oil required in the operation of its steamers, on its personal credit. Libelant had no right to impose new conditions upon the charterer. Libelant's promise to carry out the subsisting contract with the charterer, or the performance by libelant of its contractual duty to furnish charterer's vessels with oil, was not a sufficient consideration to support the charterer's consent or promise that libelant should, in the future, have a lien upon the ves-

sels. Mr. Chesebrough had no power to alter the original contract by verbal consent, and no authority to waive any rights thereunder. This phase of the case comes clearly within the principle of the case of *Alaska Packers' Ass'n. v. Domenico*, 117 Fed. 99, decided by this court: For this reason it follows that the attempted agreement was invalid, even as between libelant and charterer.

(III) Assuming that the agreement was valid as between libelant and the charterer, it was not binding upon the owner of the vessel. The owner was not represented at the making of the alleged agreement. The owner had chartered his vessel to a charterer who was bound to provide and pay for the fuel oil, and who, as obligated, paid to libelant for all the fuel supplies furnished during ten months. The charterer had not possession of the vessel, nor any right to bind the vessel, and the libelant knew this. The Act provides what persons may bind the vessel by procuring repairs; the charterer of the vessel is not among these persons, even presumptively. Mr. Chesebrough was, therefore, not authorized, either expressly or presumptively, to consent, on behalf of the owner, to what Mr. Keown told him (assuming that a conversation between these two persons would be otherwise binding upon the charterer). Mr. Chesebrough was not the owner of the vessel, nor a person authorized by the owner to order fuel oil; on the contrary, he was forbidden by the charter-party from charging the owner or the vessel with the fuel oil. Nor was he one of the persons presumed, under the Act, to have authority from the owner. Mr.

Keown, in dealing with Mr. Chesebrough, knew that the California Atlantic Steamship Company had a contract with his Oil Company, and had been furnished oil under it on its personal credit; when he told Mr. Chesebrough that it would be necessary thereafter to charge the oil to the owner, he had no right to presume that he was dealing with the owner of the vessel or any person authorized by the owner, but was bound to presume that the time charterer of a vessel has no authority whatever to bind the owner to the agreement which he apparently proposed to Mr. Chesebrough. He did not even take the trouble of inquiring for the terms of the charter-party. If libelant had really in good faith decided to furnish oil to this charterer in the future only on condition that it should have a lien on the vessel for the supply, common prudence, and indeed common fairness, should have suggested that it would deal with the owner or some person representing the owner, in the matter of supplies to the vessel; besides, after the charterer's first default in July, the dictates of honesty and good conscience would have required that libelant should promptly inform the owner of charterer's default, instead of continuing to do business with the charterer for months and to furnish more and more supplies, accumulating more and more defaults and secretly running up bills against the innocent owner.

That libelant did not rely upon the alleged agreement with Mr. Chesebrough, and did not thereafter make deliveries in reliance upon the lien which it attempted to create, is also apparent from the fact that the September, October and November deliveries (ex-

cept the one of November 27) are not attempted to be charged to the vessel, but were apparently paid by the charterer.

The last two deliveries, made on August 31 and November 27, were both made after libelant's contractual right to cancel the contract of April 18 had accrued. The price charged for these supplies is the sum of \$3172.65. Oil of this value was furnished by libelant after at least three defaults by the charterer. Before furnishing it, libelant had, under its contract, the right to refuse to furnish any further oil at all, or, before furnishing it, to require prepayment by charterer. Libelant waived these rights deliberately, not being able to resist the temptation to speculate upon the chance of mulcting the vessel in case of default by the purchaser.

It is submitted that every principle of equity forbids libelant from imposing this debt of the California-Atlantic Steamship Company, speculatively, rashly and unnecessarily incurred by the Oil Company, upon the innocent owner of the vessel, who did not order the oil, who did not need it for his charter contract, who had nothing to gain by the furnishing of it and had nothing to lose by the lack of it.

After having made many deliveries to the charterer on its personal credit, under a contract binding upon both libelant and charterer, libelant could not acquire a maritime lien upon the vessel by simply informing the charterer that it would thereafter charge the oil to the vessel, without inquiring from the charterer what its

relations were to the vessel with reference to a right to consent to a lien. The circumstances attending the transaction certainly put the libelant on inquiry as to the terms of the charter-party, of the existence of which it was informed, and as to the charterer's right to pledge the vessel to the performance of a contract which libelant had made with the charterer without any reference to this vessel, and before the charterer had any relation whatever to her. "No one with knowledge that supplies were ordered by one without authority to pledge the vessel, or no one awake to circumstances which suggest inquiry as to that authority, may shut his eyes to what he sees or to what he could see by looking." (*The Yankee*, 233 Fed. 919, 926.)

Stripped of non-essentials, the instant case resolves itself to the following propositions:

1. To give libelant a lien, it must show that the oil was furnished "upon the order of the owner, or of a person by him authorized".
2. The oil was in fact furnished under the conditions of a general agreement with the charterer, whereby the charterer was obligated to purchase the oil, and libelant was obligated to sell and deliver the oil at places specified; in other words, it was furnished by libelant in performance of its contractual obligation to charterer, upon the latter's orders.
3. The charterer was *not* a person either authorized by the owner in fact, or authorized presumptively under the Act of Congress.

4. Hence libelant has no lien upon the vessel.

The decree of the District Court should be reversed, with instructions to dismiss the libel with costs to appellant in both courts.

Dated, San Francisco,

February 10, 1921.

Respectfully submitted,

ANDROS & HENGSTLER,

LOUIS T. HENGSTLER,

Proctors for Appellants.

No. 3608

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

THE STEAMSHIP "PORTLAND", her engines,
boilers, boats, tackle, apparel, furniture
and appurtenances, and THE NATIONAL
SURETY COMPANY (a corporation),

Appellants,

vs.

UNION OIL COMPANY OF CALIFORNIA
(a corporation),

Appellee.

BRIEF FOR APPELLEE.

Upon Appeal from the Southern Division of the United States District
Court for the Northern District of California,
First Division.

FARNHAM P. GRIFFITHS,
McCUTCHEN, WILLARD, MANNON & GREENE,
Proctors for Appellee.

No. 3608

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SURETY COMPANY (a corporation),

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vs.

UNION OIL COMPANY OF CALIFORNIA
(a corporation),

Appellee.

Upon Appeal from the Southern Division of the United States District
Court for the Northern District of California,
First Division.

BRIEF FOR APPELLEE.

Statement of Case.

This is a libel *in rem* to recover the value of supplies furnished to the Steamship "Portland" on five different occasions between July 5, 1912, and November 27, 1912. Fuel oil was furnished once at the port of San Francisco; fuel oil and dunnage at Oleum, California; and fuel oil three times at Balboa, Canal Zone.

The home port of the vessel was New York. In every instance the supplies were furnished by the appellee upon an order from the master of the vessel. During the whole period the vessel was under charter to the California Atlantic Steamship Company and of this fact appellee had knowledge.

For the value of these supplies, appellee claims a lien on the vessel. The question whether the lien exists must be determined by the Act of June 23, 1910, Chap. 373, 36 U. S. Statutes at Large, page 604 (U. S. Compiled Statutes 1916, page 8229).

For convenience of reference we quote the three sections of the Act which define the circumstances under which a lien for supplies arises:

Act June 23, 1910, c. 373, Sec. 1. *“Maritime lien on vessel for repairs, supplies, etc., to be enforced in rem, without allegation or proof that credit was given to vessel.*

Any person furnishing repairs, supplies, or other necessities, including the use of dry dock or marine railway, to a vessel, whether foreign or domestic, upon the order of the owner or owners of such vessel, or of a person by him or them authorized, shall have a maritime lien on the vessel which may be enforced by a proceeding in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.

Sec. 2. *Persons presumed to have authority to procure repairs, supplies, etc., for vessel.*

The following persons shall be presumed to have authority from the owner or owners to procure repairs, supplies, and other necessities for the vessel: The managing owner, ship's husband, master, or any person to whom the management of the vessel at the port of supply is intrusted.

No person tortiously or unlawfully in possession or charge of a vessel shall have authority to bind the vessel.

Sec. 3. Officers and agents appointed by charterer, etc., included with persons specified in preceding section; no lien when want of authority to bind vessel was known to furnisher of repairs, supplies, etc.

The officers and agents of a vessel specified in section two shall be taken to include such officers and agents when appointed by a charterer, by an owner pro hac vice, or by an agreed purchaser in possession of the vessel, but nothing in this Act shall be construed to confer a lien when the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies or other necessities was without authority to bind the vessel therefor." (Compiled Stats.)

Before discussing the law applicable to the case at bar, we shall refer briefly to the history of the Act of 1910.

Condition of the law prior to the passage of the Act of 1910.

There was formerly much confusion in the law respecting the circumstances under which a lien for supplies would attach to the vessel. The law drew a sharp distinction between supplies ordered by the master in a foreign port and the supplies ordered by him in the home port. In the former case there was a presumption, subject to rebuttal, that the supplies were furnished on the credit of the vessel; in the latter, it was conclusively presumed that they were

furnished on the credit of the owner. When the owner himself ordered supplies in a foreign port, it was presumed that the credit of the vessel was not pledged.

The lien for supplies provided by State statutes and designed to protect the furnisher of supplies in the home port, gave some relief to the domestic tradesman, but did not altogether settle his case. According to one line of decisions, the conclusive presumption that supplies ordered in a home port were ordered on the credit of the owner was merely made a disputable presumption. According to the less numerous decisions, the State statutes established a conclusive presumption that the supplies were furnished on the credit of the vessel. Interrelated questions concerning the determination of the home port where there are joint owners, corporation owners, presumptions in case of conditional sale, in cases where there was a transfer of title pending performance of contract, etc., did not simplify matters. Similar questions arose where the vessel was under charter. In most of the cases we have suggested it was necessary to allege and prove that supplies were furnished on the credit of the vessel. Upon the confusion permeating the whole subject, see:

19 Eng. & Amer. Ency. of Law, pages 1093-1112;
The Yankee, 233 Fed. 919, at 924.

Purpose of the Act of 1910.

Amid this net work of presumptions and counter-presumptions, the Act of 1910 was passed. Its purpose

was to clarify. To this end the Act (1) creates a lien for supplies; (2) eliminates the distinction between foreign and domestic ports; (3) abolishes requirements of allegation and proof that credit was given to the vessel; (4) names certain persons as presumed to have authority to bind the vessel; (5) provides that the Act does not confer a lien when such persons did not have authority to bind the vessel, and such lack of authority was known, or ought to have been known, to the furnisher of supplies.

Many of the earlier sources of confusion disappear. Particularly, the elimination of the necessity of allegation and proof of credit to the vessel and the naming of certain persons as presumed to have authority to bind the vessel, must have been designed to fortify the position of one who furnishes necessary supplies to a vessel.

The Argument.

UNDER THE ACT OF JUNE 23, 1910, A LIEN ON THE VESSEL FOR THE SUPPLIES FURNISHED BY LIBELANT IS PRESUMED.

It is not disputed that the supplies furnished (fuel oil and dunnage) were of the kind contemplated in the statute as giving rise to a lien, provided, of course, that the other requirements of the statute were satisfied.

The persons named in the statute as presumed to have authority to bind the vessel for such supplies are:

“The managing owner, ship’s husband, master, or any person to whom the management of the vessel at the port of supply is entrusted.”

The supplies of oil and dunnage, for which libelant claims a lien, were furnished at San Francisco, Oleum and Balboa, upon the master's orders.

The libelant, therefore, has shown facts from which a lien for supplies will be presumed.

The Yankee, 233 Fed. 919, at 925:

“The effective provisions of this act, by which Congress disposed of the controversial features of the law of maritime liens, are those which dispense with proof that credit was given the vessel, and substitute a presumption in lieu of proof of the authority of the owner and of a person other than the owner to procure supplies and pledge the vessel. Being relieved of the necessity of proving credit to the vessel and being clothed with the presumption of the validity of the order, the libelant, upon proving delivery to the vessel, *enters court with a prima facie right to a maritime lien.*” (Italics ours.)

The burden is, therefore, upon the claimant to prove that the master was without authority to bind the vessel for the supplies furnished, such lack of authority being known or ascertainable by the libelant. *Emphatically, the burden is not on the libelant, as is erroneously stated on page 4 of claimant's brief, to prove that the master was authorized by the owner.*

II.

THE CLAIMANT HAS FAILED TO SHOW CIRCUMSTANCES WHICH DEPRIVE LIBELANT OF THE LIEN PRESUMED BY THE STATUTE.

Libelant entered court with a lien on the vessel presumed in its favor. To defeat the lien claimant must

show facts within Section 3 of the statute, providing that the Act does not confer a lien

“when the furnisher knew or by the exercise of reasonable diligence could have ascertained that because of the terms of a charter party, agreement for the sale of the vessel, or for any other reason, the person ordering the repairs, supplies or other necessities was without authority to bind the vessel therefor.”

Claimant relies upon two points, namely, that there was a general contract between the libelant and the charterer for the purchase of the fuel oil used by the charterer in operating its vessels; and that the charter under which the “Portland” was operated required the charterer to provide and pay for the fuel oil used by the vessel.

Under these circumstances claimant contends, first, that because of the general contract, the oil was in fact “procured” by the charterer, even though on “orders” from the master; secondly, that under the terms of the charter party neither the master nor the charterer had authority to bind the vessel. We shall answer these contentions in the order indicated.

(a) The argument that the oil was “procured” by the charterer and not by the master, even though on “orders” from the master, assumes that a distinction is to be made between the words “order” and “procure.” (Claimant’s brief, pp. 5, 6.)

If there is a distinction, it lies in the mind of the claimant, not in the statute. Observe the wording of the statute. In Section 1 the words are “any person furnish-

ing repairs, supplies * * * *upon the order* of the owner", etc. In Section 2 the heading uses the words "to procure", and the section itself reads: "The following persons shall be presumed to have authority * * * *to procure* repairs, supplies, etc." Section 3 provides that the Act does not confer a lien when the furnisher knew or should have known that the "person *ordering* the repairs, etc., was without authority, etc."

We submit that that the words "order" and "procure" are obviously used in the statute without distinction in meaning.

There is a suggestion in claimant's brief, conveyed rather by innuendo than by direct statement, that perhaps the master did not place oil requirements directly in the hands of the libelant and, therefore, did not "order" them (Br. pp. 9-10). We ask the attention of the court to Paragraph IV in the Memorandum for Stipulation of Facts (Apos. p. 18), wherein it is stated that

"from time to time libelant furnished to said Steamer Portland fuel oil in the amounts as follows, upon orders from the master" (followed by a statement of the time, place, amount and value of the supplies furnished).

Under that stipulation, claimant cannot urge that there was not an "order" from the master for these supplies.

Conceding, therefore, that there was a general contract between the libelant and the charterer for fuel oil used by the charterer's vessels, it cannot be disputed but that the libelant furnished these supplies in

amounts and at times and places as they were "ordered" or "procured" by the master.

(b) The claimant's chief contention, however, is that where a charter party expressly provides that the charterer shall provide and pay for the supplies, nothing being provided in the charter party as to the power to impose liens upon the vessel, neither the charterer or the master has authority to impose liens upon the vessel for supplies.

Preliminary to the discussion of this point we may say that we do not dispute the rule and the authorities cited by claimant that libelant, knowing it was dealing with a charterer, was put on inquiry as to the terms of the charter party. But conceding this rule, what would libelant have learned had all the terms of the charter party been known and considered? Would libelant have known conclusively that the vessel could not be made responsible for any of the supplies furnished and used by her?

An examination of the charter party would not have disclosed that the master or charterer was without authority to bind the vessel for supplies of oil furnished at a distant port. The charter party simply states that the charterer shall provide and pay for the fuel. It does not in terms prohibit anyone mentioned in Section 2 of the Act of June 23, 1910, from binding the vessel for necessities. A careful reading of the charter party by libelant would not have disclosed that the master, who is presumed to have authority to bind the vessel, had in fact no authority to do so.

The Act is mandatory in its provisions. We submit that a charter party, in order to withdraw the authority of the master to bind the vessel and to prevent the application of the lien presumed by the statute, must have a stronger provision than a mere clause that the charterer shall provide and pay for the fuel oil. Such a term merely regulates rights between the charterer and the owner and leaves untouched the liens in favor of third persons. Payment for supplies is one thing. A lien attaching to the vessel until the supplies are paid for is another. A term in the charter party relating to the first matter cannot be substituted for a clause governing the second.

The question was squarely before the court in

The South Coast, 233 Fed. 327.

In that case the charter party required the charterer to pay the expenses incurred in operating the vessel as well as to pay for the supplies furnished the vessel. It did not, however, in terms deprive the master of his authority to bind the vessel for the supplies so furnished. In ordering a decree for the libelant, Judge Dooling said:

“But by the charter in the instant case the person ordering the supplies—that is to say, the master—was not without authority to bind the vessel therefor. And while the owners took every precaution to warn the furnisher of the supplies not to have any of them go on the ship’s account, *they did not take the essential and fundamental precaution to provide by the terms of the charter that the charterer, or the master appointed by him, should be without authority to bind the vessel therefor.* (Italics ours.)

Upon appeal this court affirmed the decree and said (247 Fed. 84):

“The repairs and supplies in question were furnished on the order of the master. The master, who was appointed by the owner, was obliged, under the charter party, to take his directions from the charterer. The libelant was apprised of the existence of the charter party, and was warned by the owner not to furnish supplies on the ship’s credit. The libelant, nevertheless, furnished the supplies, with the declaration to the owner’s representative that he would not furnish them in any other way, or under any other conditions, than upon the credit of the ship.

It is the purpose of the statute, as it was the purpose of the law previous thereto, that the furnisher of such commodities as are necessary to enable a ship to enter upon or pursue her voyage, and to engage in maritime traffic, to which only she is adapted, shall have a lien on the ship therefor. It is in the interest of shipping, conducted upon maritime waters, that such should be the case, as otherwise credit would not be extended, upon the account of the owner or master alone, to enable the ship to discharge its peculiar function, and great inconvenience would follow, to the detriment and disadvantage, if not the ultimate disaster in large measure, of maritime shipping. Many ships sail under charter, either verbal or in form of regularly drawn charter parties, and it is usual and customary for the charterer in either event to disburse the necessary expenses of the ship; and of this all persons furnishing supplies, etc., to a chartered ship must be deemed to have notice. But notwithstanding this notice, or even knowledge that the ship is under charter, we cannot believe that it was the intendment of the statute or of the law that the furnisher should, because of that fact, be deprived of his lien when advancing necessary repairs or supplies in good faith to enable the ship

to engage in her accustomed traffic. Nor do we believe that it was the intendment of the statute or of the law thus to impose so vital a hindrance upon maritime shipping, *and unless there is something more in the charter party, that unalterably inhibits the master or the charterer from incurring any expenditures on the credit of the ship that may become a lien thereon, the master's ordinary authority is not impaired or abbreviated; nor can the right of the furnisher of repairs, etc., to extend credit to the ship, and his consequent lien, so be subverted.*" (Italics ours.)

Is there anything in the Portland charter that "unalterably inhibits the master or the charterer from incurring any expenditures on the credit of the ship"?

Certiorari was then granted by the Supreme Court of the United States and the judgment of this court was affirmed in

251 U. S. 519; 64 L. Ed. 311.

The Supreme Court, speaking through Mr. Justice Holmes, expressly held that the charter party did not exclude the power of the master to impose a lien on the vessel for supplies, and, therefore, there was nothing from which the furnisher could have ascertained that the master did not have power to bind the ship.

Claimant's attempt to distinguish *The South Coast*.

Claimant's brief attempts with much particularity and assiduity to distinguish *The South Coast* from the case at bar.

It is argued that in the instant case the charter party does not recognize that liens may be imposed by

the charterer, the reasons for this contention being that the charter party provides that the charterer shall pay for the fuel; that the charter was a time charter, hire being payable per running day whether the vessel moved or not; and that the charter party provided that a lien for moneys paid in advance could be imposed by the charterer.

These facts do not afford ground for distinguishing the two cases. The charter party in *The South Coast* also required the charterer to provide and pay for the supplies as well as all the operating expenses of the vessel. As to the suggestion that the charter hire of the "Portland" was payable per running day whether the vessel moved or not (the inference being that it was not for the benefit of the owner that fuel oil should be bought, immaterial if true), we wish to point out that the charter hire of the "South Coast", or the purchase price under the conditional bill of sale, did not depend upon the operation of the vessel. In that case, too, it made no difference to the owner whether supplies and fuel were bought, or whether the vessel was kept stationary. But the existence of a lien is not determined by the presence or absence of benefit to the owner from the operation of the vessel. The Act of 1910 was not drawn upon the theory that a lien on the vessel was conferred only when it was given for supplies benefiting the owner. That is not the theory of the statute. Its purpose was, in the language of this court,

"that the furnisher of such commodities as are necessary to enable a ship to enter upon or pur-

sue her voyage, and to engage in maritime traffic, to which only she is adapted, shall have a lien on the ship therefor.”

(*The South Coast*, *supra*.)

Nor is the fact that the charter party of the “Portland” gives a lien on the ship

“for all moneys paid in advance and not earned” any ground for distinguishing the two cases. This clause refers to a lien given *by the owners to the charterers* and is not concerned in the least with liens given *by the charterer to third persons*.

Next, an attempt is made to distinguish *The South Coast* on the ground that in that case the charterers ordering the supplies were actually the owners *pro hac vice*, and had possession and control of the vessel (and, therefore, were presumed under the statute to have authority to impose a lien), whereas in the instant case the charterers were not in possession and, therefore, had no presumptive right to pledge the vessel. Let us be accurate. In *The South Coast* case none of the three courts by whom the facts of the case were considered, made reference to the possession of the charterer or put the decision on that ground. It was expressly held that supplies were furnished on the order from the master, whose power to impose the lien was not excluded by the charter party. To argue, therefore, that the case at bar is distinguishable because *this* charterer did not have full possession and control, is simply to introduce a false quantity into the case. Moreover, in this case the supplies were ordered by the master.

The third and last ground of distinction urged in claimant's brief is based upon the fact that there was a general contract between the libelant and the charterer for the supply of fuel oil, the charterer being well known to the libelant, whereas in *The South Coast* case there was no standing contract and therefore the furnishers there "relied upon the credit of the vessel" (appellant's brief, page 13). Is this not an argument that this libelant must allege and prove "credit to the vessel"? And is this not precisely what the Act of 1910 expressly relieves libelant from doing? This is so plain that we confess to some surprise that the point should be urged.

Other cases cited by claimant.

Most of the other cases cited by claimant,

The Oceana, 233 Fed. 139; 244 Fed. 80;

The Castor, 267 Fed. 608;

The Mary A. Tryon, 93 Fed. 220;

The Penn, 266 Fed. 933,

are to the point that one knowing that he is dealing with a charterer is put on inquiry as to the terms of the charter party. This we do not dispute.

The case of *Curacao Trading Co. v. Bjorje*, 263 Fed. 693, was decided on the express ground that the supplies therein involved were ordered, *not by the master, but by the charterers*. The libelant, therefore, did not enter court clothed with a prima facie lien, as in the case at bar, but, on the contrary, was required to prove that the charterers were authorized to pledge the vessel. He failed in sustaining this burden of proof.

We do not consider it necessary or material to consider the effect of the agreement between Mr. Keown and Mr. Chesebrough that the supplies should be charged to the vessel, save that we desire to point out (in contradiction to counsel's argument on page 13), that this agreement shows that the libellant in fact relied upon the credit of the vessel. The supplies were, therefore, furnished in foreign ports under circumstances which would have imposed a lien prior to the Act of 1910.

We may also say, in passing, that it must have been by inadvertence that learned counsel for claimant argues that this agreement between Mr. Keown and Mr. Chesebrough was invalid because not in writing, for of course he knows the decision of the United States Supreme Court in

Union Fish Co. v. Erickson, 248 U. S. 308; 63
L. Ed. 261.

Moreover, this was not a contract which, *by its terms*, was not to be performed within a year.

CONCLUSION.

The latter part of claimant's brief, with its references to the "innocent owner" and debts "speculatively, rashly and unnecessarily incurred" is the old resort to sentimentality where argument fails. The statute was not designed to give a lien only for supplies for which, as between the owner and the charterer, the owner had to pay, but for all supplies or-

dered by parties authorized actually or by presumption to order them, to the end, as the court suggested in *The South Coast*, *supra*, that vessels might proceed about their business without undue let or hindrance.

The libelant delivered supplies upon the master's orders, a person who by statute and on principle was authorized to order supplies for the vessel. If he was not in fact so authorized, claimant failed to incorporate such a provision in the charter party. If claimant wished to deprive the master of this power, it was an easy matter so to provide in the charter party. We may say finally that, in its last analysis, the claimant's defense is based upon a presumption designed to counteract the effect of the statute. This point cannot be better expressed than it was in the brief filed in this court by the appellee in *The South Coast*,

“A supply man furnishes supplies to a vessel on the order of the master representing the charterers. Under the law, he is entitled to a lien on that state of facts; but says the owner, the law presumes that from your knowledge of the charter, you were also aware that the charterers were bound to pay the operating expenses, and consequently, you have no lien. Thus the legal presumption in favor of a lien from a given state of facts would be defeated by a further legal presumption from the same state of facts. The conclusion is, therefore, irresistible that whatever the law may have been prior to June 23rd, 1910, knowledge on the part of the supply man that the charterer was bound to pay the operating expenses and keep the vessel free from liens, is immaterial under the Federal Act of said date and that nothing can defeat his lien, except, affirmative proof that he

knew, or ought to have known that the charter party prohibited the charterer from giving a lien on the vessel."

We submit that this logic is unanswerable.

Dated, San Francisco,

March 1, 1921.

Respectfully submitted,

FARNHAM P. GRIFFITHS,

MCCUTCHEN, WILLARD, MANNON & GREENE,

Proctors for Appellee.

No. 3608

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE STEAMSHIP "PORTLAND", her engines,
boilers, boats, tackle, apparel, furniture
and appurtenances, and THE NATIONAL
SURETY COMPANY (a corporation),

Appellants,

vs.

UNION OIL COMPANY OF CALIFORNIA
(a corporation),

Appellee.

MEMORANDUM ADDITION TO BRIEF FOR APPELLANTS.

Upon Appeal from the Southern Division of the United States District
Court for the Northern District of California,
First Division.

ANDROS & HENGSTLER,
LOUIS T. HENGSTLER,
Proctors for Appellants.

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(a corporation),

Appellee.

MEMORANDUM ADDITION TO BRIEF FOR APPELLANTS.

Upon Appeal from the Southern Division of the United States District
Court for the Northern District of California,
First Division.

The Millinocket, 266 Fed. 392:

1. A *bunkering contract* between libelants and charterer obligated libelants to supply all the vessels chartered by a charterer.

Held: Libelants cannot assert a lien, because "this indicates that the libelants dealt with [the charterer]

personally'', and did not rely upon the credit of the ship.

2. Libelants had notice of the terms of a *charter-party* requiring one not the owner to pay for the fuel.

Held: Libelants are not entitled to a lien.

3. Libelants attempted to collect from charterer for coal delivered on board the vessel before seeking to recover from the vessel.

Held: Any lien against the vessel was *waived* by such attempt.

In the instant case the following facts appear:

(a) Charterer was obligated to provide and pay for all the fuel.

(b) Libelant had notice of this fact (controls holding 2, above, in case cited).

(c) Libelant and charterer had made an oil contract under which libelant was obligated to supply all the oil required by the vessels chartered upon the order and credit of charterer (controls holding 1, above, in case cited).

(d) Under this oil contract libelant had on frequent previous occasions supplied the vessel chartered with oil and been paid therefor by the charterer.

(e) Under the conditions of this oil contract the requisitions in suit were made.

(f) The conditions under which libelant supplied the oil were that, in case charterer should default in

payment, libelant should have either the right to cancel the contract or the right to require prepayment for further supplies. There was no right of lien given by this contract.

(g) All supplies previously furnished were paid by the charterer; the libel in rem was filed because the bills for the supplies in suit had not been paid by the charterer (controls holding 3, above, in case cited).

We also contend that fact (f) constitutes a waiver, in advance, of any lien upon the vessel supplied.

Libelant's strongest reliance is upon the words of the "Memorandum for Stipulation of Facts", reading:

"IV. From time to time libelant furnished to said steamer 'Portland' fuel oil * * * upon orders from the Master" (Apostles, p. 18).

In this connection we recall the following facts:

1. The libel alleges the fuel oil "*was furnished by order of the master and charterer* (p. 10).

2. The answer denies that the fuel oil "*was furnished by order of the master*", and admits that it was furnished by order of the charterer (p. 13).

3. The stipulated facts allege that the fuel oil "*was furnished at the prices and under the conditions specified in said*" oil contract (p. 20).

The fact is, therefore, that ALL THE OIL WAS PROCURED AND FURNISHED UNDER THE CONDITIONS OF THE OIL CONTRACT MADE WITH THE CHARTERER "UPON ORDERS FROM THE MASTER". All the oil required by the charterer for the "Portland" was procured and belonged to

the charterer, by virtue of its contract; the master had nothing to do with getting it, except that, under directions from the charterer, of which libelant was informed, he told libelant, how much of the oil already contracted for was required on particular occasions for the charterer's purposes. In this respect the instant case is not distinguishable from the case of *Curacao Trading Co. v. Bjorje*, 263 F. 693 (C. C. A., 5th Circuit), cited in our brief.

We also cite, for the convenience of the court, the following language used in the *Curacao* case and applicable to the instant case:

"The coal was not procured by any one having either actual or presumed authority to bind the owner. Furthermore, circumstances either known to the appellant or which it easily could have ascertained made it apparent that it was not to be expected that the owner, or the master for it, would be concerned about this vessel being supplied with the coal required to enable it to proceed on its voyage. The vessel being under a time charter, having several months to run, the hire would not stop while it was waiting at Curacao for lack of coal."

The distinction made by the court in the *Curacao* case, from the decision of the "South Coast" case, on the ground that, in the latter case, "*the charter-party recognized that liens might be imposed by the charterer*", applies equally to the case at bar:

"In the instant case the coal was ordered, not by the master, but by the charterers, who were not expressly or impliedly given authority to subject the vessel to liens for supplies. The case cited is not authority for the proposition that a vessel may

be subjected to a lien for the price or value of supplies furnished to a charterer who is without authority to bind the vessel or its owner therefor. The coal now in question having been procured, not by anyone having authority to bind the vessel for it, but by the charterers, who, under the terms of the charter-party, were, as the furnisher understood, required to pay for such supplies, it is not material that the furnisher thought that the vessel was responsible."

We submit that this distinction is unanswerable and conclusive, and that the libel filed in this case should be dismissed.

Dated, San Francisco,
March 10, 1921.

Respectfully submitted,

ANDROS & HENGSTLER,
LOUIS T. HENGSTLER,
Proctors for Appellants.

No. 3608

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE STEAMSHIP "PORTLAND", her engines,
boilers, boats, tackle, apparel, furniture
and appurtenances, and THE NATIONAL
SURETY COMPANY (a corporation),

Appellants,

VS.

UNION OIL COMPANY OF CALIFORNIA
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Appellee.

SUPPLEMENTARY BRIEF FOR APPELLEE.

Upon Appeal from the Southern Division of the United States District
Court for the Northern District of California,
First Division.

FARNHAM P. GRIFFITHS,
MCCUTCHEEN, WILLARD, MANNON & GREENE,
Proctors for Appellee.

FILED

MAR 17 1911

U. S. DISTRICT COURT

No. 3608

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE STEAMSHIP "PORTLAND", her engines,
boilers, boats, tackle, apparel, furniture
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SURETY COMPANY (a corporation),

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vs.

UNION OIL COMPANY OF CALIFORNIA
(a corporation),

Appellee.

SUPPLEMENTARY BRIEF FOR APPELLEE.

Upon Appeal from the Southern Division of the United States District
Court for the Northern District of California,
First Division.

The Memorandum Addition to the Brief for Appellants is chiefly devoted to

The Millinocket, 266 Fed. 392.

The facts of the case are abbreviated in the report. It appears that libellant supplied coal to one Frederick Crotois, a sub-charterer of the "Millinocket"

from the claimant, Harris, Magill & Company, who were themselves the sub-charterers of the vessel. Under the sub-charter Crotois was to pay for all the coal used. Libelant was informed of this fact at the time the coal was ordered and supplied pursuant to a contract between libelant and Crotois. Even a cursory reading of the case brings out this outstanding fact—that the coal was not ordered or supplied upon the order of a person presumed by the statute to have authority to bind the vessel. Under the statute the charterer (and, of course, the sub-charterer) is not armed with such presumptive authority. There is not a line in the case to indicate that anyone named in the statute as presumed to have authority in fact ordered the coal. The libelant's lien, therefore, depended on whether or not the sub-charterer Crotois had authority in fact to pledge the vessel and whether she was pledged. The libelant was in virtually the same position as he would have been prior to the statute of 1910. He had to prove that the supplies were furnished on the credit of the vessel on the order of one duly authorized thereto. Under *The Kate*, 164 U. S. 458 (decided before the Act of 1910) and *The Sylvan Glen*, 241 Fed. 731 (decided since the Act of 1910), both of which cases were cited by the court in *The Millinocket*, the libelant's claim for a lien was futile—the orders having been placed by the charterer who was without presumptive authority.

The contentions set forth in appellant's memorandum (pages 1 and 2) rest on a misconception of the holding of *The Millinocket* case resulting from disregard

of the all essential fact in the case that no order from one presumed to have authority to bind the vessel is involved. The true situation in *The Millinocket* case as compared with the case at bar is as follows:

In *The Millinocket* case: (1) there was no lien presumed in favor of the libellant; and therefore (2) the existence of the lien depended upon proof that the sub-charterer was in fact authorized to pledge the vessel.

In the case at bar: (1) libellant furnished supplies on the master's order; (2) consequently there was a presumptive lien in its favor; (3) to subvert the lien, proof is necessary that the master, under the charter party, had no authority to bind the vessel; (4) no such proof has been or can be made since the charter party did not exclude his power, express inhibition being necessary therefor, under the holding of all three courts in the South Coast (233 Fed. 327; 247 Fed. 84; 251 U. S. 519; see below).

Such considerations as the fact that libellant had on previous occasions supplied the vessel and had been paid by the charterer, that in case of non-payment by the charterer libellant would have the right to cancel the contract (App. Supp. Mem. p. 2) do not change the rules of law applicable to the case.

Appellant also cites *The Millinocket* as authority for holding that libellant in the case at bar has waived its lien. There the court expressly held that there was no lien but suggested by way of dictum, that if there were, it was waived, and cited as authority *The Eastern*,

257 Fed. 874. In *The Eastern* there was no question but that a lien attached by reason of an order given by the ship's engineer who was entrusted with the management of the vessel at the port of supply. Libellant was notified immediately after supplies were delivered that the engineer had no authority in fact to pledge the vessel. The libellant billed the charterer for the supplies after it knew that the charterer had no right to pledge the credit of the vessel, and did not present any accounts to the owner of the tug or intimate any intention to hold the vessel until a considerable time later. The wide differences in the facts of *The Eastern* from those in the case at bar are manifest.

THE STIPULATED FACT THAT THE OIL WAS FURNISHED TO THE STEAMER "UPON ORDERS FROM THE MASTER".

With all respect to counsel for appellants, it appears to us that their argument in this connection savors of afterthought and runs toward equivocation and play on words.

Let us be plain about the situation. The libel alleges (Ap. 10):

"That the dunnage and fuel oil aforesaid was furnished by order of the master and charterer of said vessel, and was charged to said vessel by libellant."

The answer is (Ap. p. 13) that claimant

"denies that the alleged dunnage and fuel oil was furnished by order of the master and charterers or by the master of said vessel".

With the pleadings in that state the parties met and drew a stipulation of facts in which they set uncertainty at rest as follows (Ap. p. 18):

“From time to time libelant furnished to said steamer ‘Portland’ fuel oil in the amounts as follows upon orders from the Master:” (there follows a list of five several furnishings).

How simple it would have been, had the parties so intended, to say that the fuel oil had been furnished upon orders of the charterer, the master merely designating (as appellants urge and as was the case in the Curacao case on which appellants rely) how much oil was needed on each occasion! Why say that the oil was furnished *upon orders from the master* with no reference to the charterer if the latter ordered and the former was a mere medium for transmission of the order as in *The Curacao* case (we quote the pertinent passages from that case below)?

And is not appellants’ insistence on a distinction between orders *of* and orders *from* the master the merest play on words?

THE SOUTH COAST.

In all that has been said we fail to see how this case can be distinguished from the South Coast (*supra*).

All three courts (the District Court, this court, the United States Supreme Court) held that if the *Master* (one presumptively authorized by the statute) ordered the supplies there must, to defeat the lien, have been an inhibition in the charter party against a binding of

the vessel by the charterer or master. A mere provision that the charterer should pay for the fuel oil would not suffice. Such provision appeared in the South Coast charter party as in the Portland charter party.

Respecting the necessity of the inhibition, Judge Dooling said (233 Fed. 327, at 329):

“And while the owners took every precaution to warn the furnisher of the supplies not to have any of them go on the ship’s account, *they did not take the essential and fundamental precaution to provide by the terms of the charter that the charterer, or the master appointed by him, should be without authority to bind the vessel therefor.*” (Italics ours.)

In this court Judge Wolverton said (247 Fed. 84, at 89) that:

“* * * unless there is something more in the charter party, that unalterably inhibits the master or the charterer from incurring any expenditures on the credit of the ship that may become a lien thereon, the master’s ordinary authority is not impaired or abbreviated; nor can the right of the furnisher of repairs, etc., to extend credit to the ship, and his consequent lien, be so subverted.”

And finally, in the United States Supreme Court, Mr. Justice Holmes (251 U. S. 519) said:

“But the authority of the owner to prohibit or to speak was misplaced, so far as the charter went, by that conferred upon the charterers, who became owners pro hac vice, and therefore, *unless the charter excluded the master’s power*, the owner could not forbid its use * * * Therefore, the charterer was assumed to have power to authorize the master

to impose a lien in a domestic port, and if the assumption expressed in words was not equivalent to a grant of power, *at least it can not be taken to have excluded it. There was nothing from which the furnisher could have ascertained that the master did not have power to bind the ship.*" (Italics ours.)

The foregoing shows the fallacy of the argument on which appellants rely (Appellant's Major Brief, p. 11) that in *The South Coast* "the charter party recognized that liens might be imposed by the charterer" because the charter party provided that the charterer should *keep* the vessel free and clear of liens. To this the Supreme Court answers that if such clause were not a *grant* of power to create liens "at least it can not be taken to have excluded it" and by necessary implication a clause of exclusion is essential and was not present in *The South Coast* case nor here, though the charter parties in both cases provided that the charterers should pay for the fuel.

THE CURACAO CASE.

The Curacao case (263 Fed. 693) in which appellant takes so much comfort, is *not* authority for holding that libellant has no lien. In that case the master had nothing to do with ordering the supplies.

We quote the pertinent passages:

"On the arrival of the ship at Curacao a representative of the libellant came aboard, stated to the master that they had the bunkering of the ship according to contract with George S. Taylor & Co.,

and that they would supply the bunkers sufficient to take the ship to Rio, and had the master telegraph to the charterers, stating how many tons of bunkers he would take, and asking the charterers to arrange for payment of same. In reply the charterers telegraphed that they would pay for the bunkers the ship received at Curacao. Thereupon the libelant furnished the number of tons of coal the master stated he could take on board, and received from the master his draft, payable 30 days after sight, on the charterers, for the contract price, which draft was duly accepted by the charterers, but was not paid.

* * * * *

Assuming, without deciding, that that statute is applicable to the transaction in question, we are not of opinion that the furnisher acquired the lien claimed. According to the evidence it was not procured by the master, or by any one authorized to bind the vessel, therefore, but was procured by and furnished to the charterers on their order and credit. So far as appears, the master had nothing to do with getting the coal, except that, under directions from the charterers, of which the appellant was informed, he told the appellant how many tons were required. The statute does not create a presumption that a charterer, unless he is also either the 'ship's husband, master or a person to whom the management of the vessel at the port of supply is intrusted,' has authority from the owner to procure repairs, supplies, or other necessities for the vessel. No lien on a vessel is given for supplies procured by one having no such relations to it that, under the terms of the statute, he is presumed to have authority from the owner to procure supplies."

Under such facts there could be no doubt that no one but the charterer ordered the coal, and therefore there was no presumptive lien on the vessel. In the

absence of the presumptive lien, the burden was then upon the libellant to show that in fact the charterer was authorized to bind the vessel. He could not meet this burden of proof. The vital difference between the case at bar and *The Curacao* case is that we show a presumptive lien under the statute, whereas, in *The Curacao* case the libellant could not. The difference in the resulting burden of proof is too obvious for comment.

PARAGRAPH V OF THE STIPULATION REGARDING THE CONDITIONS UNDER WHICH THE OIL WAS FURNISHED.

Repeatedly upon the oral argument and now again in its Memorandum Addition to the first brief, counsel for appellants stated and states that

“The stipulated facts allege that the fuel oil ‘was furnished at the prices and under the conditions specified in said’ oil contract”,

but neither in the oral argument nor here did counsel complete the sentence from which he quoted, the last phrase being “*except as modified in this section*”, the section referring to paragraph V of the stipulation of facts and the modification being that there should be a lien upon the vessel (Ap. pp. 20-21).

Dated, San Francisco,

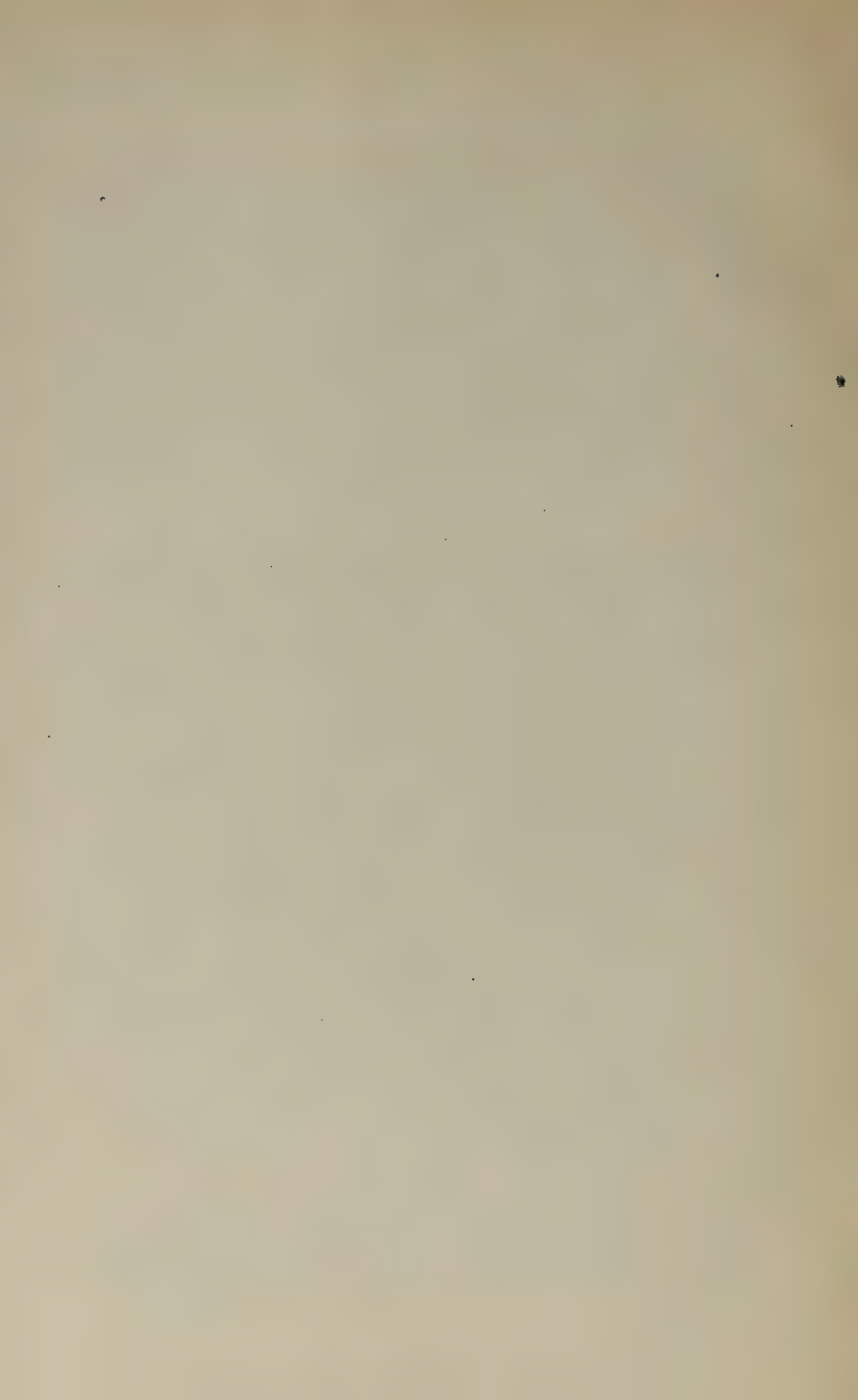
March 16, 1921.

Respectfully submitted,

FARNHAM P. GRIFFITHS,

MCCUTCHEN, WILLARD, MANNON & GREENE,

Proctors for Appellee.



United States
⁴
Circuit Court of Appeals
For the Ninth Circuit.

TOYO KISEN KAISHA, a Corporation, as Claimant of the Japanese Steamship "KOREA MARU," Her Engines, Boilers, Boats, Tackle, Apparel and Furniture, and UNITED STATES FIDELITY & GUARANTY COMPANY, Her Stipulator,

Appellants,

vs.

CHARLES D. WILLITS and I. L. PATTERSON, Copartners Doing Business Under the Firm Name of WILLITS AND PATTERSON,

Appellees.

Apostles on Appeal.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California,
First Division.

FILED

JAN 5 - 1921

F. D. MUNKTON,

CLERK

United States
Circuit Court of Appeals
For the Ninth Circuit.

TOYO KISEN KAISHA, a Corporation, as Claimant of the Japanese Steamship "KOREA MARU," Her Engines, Boilers, Boats, Tackle, Apparel and Furniture, and UNITED STATES FIDELITY & GUARANTY COMPANY, Her Stipulator,
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UNITED STATES OF AMERICA.

District Court of the United States, Northern District of California.

Clerk's Office.

No. 16,302.

CHARLES D. WILLITS and I. L. PATTERSON,
Copartners, Doing Business Under the Firm
Name of WILLITS and PATTERSON,
Libelants,

vs.

The Japanese Steamship "KOREA MARU," Her
Engines, Boilers, Boats, Tackle, Apparel and
Furniture,

Respondent.

TOYO KISEN KAISHA,

Claimant.

Praeceptum (for Apostles on Appeal).

To the Clerk of Said Court:

Sir: Please incorporate in the Apostles on Appeal in the above-entitled cause the following:

This praecipe.

Libel.

Claim.

Bond for release of vessel.

Answer.

All depositions and testimony taken.

Further answer to interrogatories.

Stipulation as to testimony of witnesses.

Answers to interrogatories of claimant.

Stipulation regarding condition of cocoa oil.

Amendment to libel.

Interlocutory decree.

Order referring cause to commissioner.

Report of commissioner on reference.

Claimant's exceptions to report of commissioner on reference.

Order overruling exceptions to report of commissioner on reference.

Order confirming report of commissioner.

Final decree.

Notice of appeal.

Bond for costs on appeal.

Bond staying execution pending decision on appeal.

Notice of filing above bonds, and

Assignment of errors.

SAMUEL KNIGHT and

F. ELDRED BOLAND,

Proctors for Respondent, Claimant and U. S. Fidelity & Guaranty Co.

[Endorsed]: Filed Dec. 9, 1920. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [1*]

*Page-number appearing at foot of page of original certified Apostles on Appeal.

In the Southern Division of the District Court of
the United States, for the Northern District of
California, First Division.

No. 16,302.

CHARLES D. WILLITS and I. L. PATTERSON,
Copartners, Doing Business Under the Firm
Name of WILLITS and PATTERSON,
Libelants,

vs.

The Japanese Steamship "KOREA MARU," Her
Engines, Boilers, Boats, Tackle, Apparel and
Furniture,
Respondent.

Statement of Clerk U. S. District Court.

PARTIES.

Libelants: CHARLES D. WILLITS and I. L.
PATTERSON, Copartners, Doing Business
Under the Firm Name of WILLITS & PAT-
TERSON.

Respondent: The Japanese Steamship "KOREA
MARU," Her Engines, Boilers, Boats, Tackle,
Apparel and Furniture.

Claimant: TOYO KISEN KAISHA, a Corpora-
tion. [2]

PROCTORS.

For Libelants and Appellees: McCUTCHEN, WIL-
LARD, MANNON & GREENE (formerly
McCUTCHEN, OLNEY & WILLARD), San
Francisco.

For Respondent and Claimant, Appellant: SAMUEL KNIGHT, Esq., and F. ELDRED BOLLAND, Esq., San Francisco.

PROCEEDINGS.

1917.

November 9. Filed libel for damage to cargo in the sum of \$13,224.68, with interrogatories attached.

Issued monition for attachment of the steamship "Korea Maru," which monition was, on November 20th, returned and filed, with the following return endorsed thereon: "In obedience to the within monition, I attached the Jap. Strm. 'Korea Maru' therein described, on the ninth day of November, 1917, and have given due notice to all persons claiming the same that this Court will, on the twentieth day of November, 1917 (if that day be a day of jurisdiction, if not, on the next day of jurisdiction thereafter), proceed to trial and condemnation thereof, should no claim be interposed for the same. I further return that I posted a notice of seizure on the herein-named

Jap. Strm. 'Korea Maru,' at San Francisco, Calif.

J. B. HOLOHAN,
United States Marshal.
By Thos. F. Mulhall,
Deputy.

San Francisco, Cal., November
9th, 1917." [3]

November 9. Filed claim of Toyo Kisen Kaisha,
a corporation, to steamship
"Korea Maru."

Filed admiralty stipulation for the
release of said steamship, in the
sum of \$17,000.00, with the
United States Fidelity & Guar-
anty Co. as surety.

1918.

October 1. Filed answer to libel; answers to
interrogatories propounded by
libelant; and interrogatories to
be propounded to libelant.

December 19. Filed further answer of claimant
to interrogatories propounded by
libelant.

1919.

February 7. Filed answers to interrogatories
propounded by claimant.

12. Filed deposition of George C. Ar-
nold, taken on behalf of libelants.

March 25. Hearing was this day had, before
the Honorable Edward E. Cush-
man, Judge.

26. Further hearing was this day had,
and the cause submitted.
Filed depositions of T. Ota et al.,
taken on behalf of claimant.
Filed deposition of U. Kondo,
taken on behalf of claimant.
- April 25. Filed deposition of Chiyokichi Ito,
taken on behalf of claimant.
Filed transcript of testimony taken
in open court.
- May 21. Filed amendment to libel. [4]
1919.
- October 16. Filed written opinion, in which it
was ordered that the libelants re-
cover damages, and the cause re-
ferred to United States Commis-
sioner to ascertain the amount
due.
22. Filed interlocutory decree.
- 1920.
- September 3. Filed report of commissioner, with
transcript of proceedings had
before him.
11. Filed exceptions to commissioner's
report.
18. This cause came on this day for
hearing on the exceptions to com-
missioner's report, before the
Honorable Maurice T. Dooling,
Judge, and after argument, was
ordered submitted.

October 20. Filed order overruling exceptions to
commissioner's report and di-
recting a decree to be entered in
favor of libelants for the sum of
\$12,055.74.

27. Filed final decree.

November 29. Filed notice of appeal.
Filed assignment of errors.
Filed supersedeas, and cost bonds
on appeal. [5]

In the Southern Division of the United States Dis-
trict Court in and for the Northern District of
California, First Division.

IN ADMIRALTY.—No. 16,302.

CHARLES D. WILLITS and I. L. PATTERSON,
Copartners, Doing Business Under the Firm
Name of WILLITS and PATTERSON,
Libelants,

vs.

The Japanese Steamship "KOREA MARU," Her
Engines, Boilers, Boats, Tackle, Apparel and
Furniture,

Respondent.

Libel.

To the Honorable the Judges of the United States
District Court for the Northern District of Cal-
ifornia:

The libel of Willits and Patterson against

the Japanese steamship "Korea Maru" in a cause of damages, civil and maritime, alleges as follows:

I.

That libelants are copartners doing business under the firm name and style of Willits and Patterson, and have their principal place of business in the City of San Francisco, State of California.

II.

That respondent steamship "Korea Maru" is a Japanese steamship of about 11,276 tons gross register and is now afloat in the waters of San Francisco Bay within the jurisdiction of the United States and of this Honorable Court.

III.

That heretofore on or about the 7th day of July, 1917, libelants shipped, in good order and condition, on respondent [6] steamship as a common carrier of merchandise at the port of Manila, P. I., for transportation to and delivery at the port of San Francisco, California, 302 barrels of cocoanut oil weighing 136,677 pounds; that thereafter said steamship sailed upon said voyage and subsequently arrived at said port of San Francisco, but failed to deliver to libelants all of said cocoanut oil, namely, 88,798 pounds thereof, of the value of \$12,067.65.

IV.

That on said 7th day of July, 1917, Carrero Vidal & Co. shipped, in good order and condition, on respondent steamship, as a common carrier of merchandise at the port of Manila, P. I., for transportation to and delivery at the port of San Francisco,

California, 40 barrels of cocoanut oil, weighing 18,129 pounds; that thereafter said steamship sailed upon said voyage and subsequently arrived at said port of San Francisco, but failed to deliver to libelants all of said cocoanut oil, namely, 4,729 pounds thereof, of the value of \$642.67; that said oil was during all of said times owned by libelants.

V.

That heretofore on the 5th day of July, 1917, Carrero Vidal & Co. shipped, in good order and condition, on respondent steamship, as a common carrier of merchandise at the port of Manila, P. I., for transportation to and delivery at the port of San Francisco, California, 200 barrells of cocoanut oil, weighing 90,911 pounds; that thereafter said steamship sailed upon said voyage and subsequently arrived at said port of San Francisco, but failed to deliver to libelants all of said cocoanut oil, namely, 3,882 pounds thereof, of the value of \$514.36; that said oil was during all of said times owned by libelants.

VI.

That freight was prepaid on said shipments as follows: [7]

On said 302 barrels.....	\$1,515
On said 40 barrels.....	165 and
On said 200 barrels.....	
<hr/>	
Or a total of.....	\$

VII.

That said cocoanut oil was an article which required stowage in a cool and ventilated cargo com-

partment of said steamship for its proper and safe carriage; that instead of being so stowed and carried on said voyage, however, libelants are informed and believe and so allege that said cocoanut oil was improperly stowed in tanks in the after part of said steamship immediately adjoining the engine-room, which said tanks and said oil were subjected to heat and were without any proper or efficient ventilation whatsoever; that by reason of said improper stowage and said negligent care of said cargo, said cocoanut oil was caused by said heat to liquefy and to escape from the barrels in which same was contained to the bottom of said tanks in which it was stowed; that upon said oil so escaping from said barrels, and instead of saving the same, the officers, crew and employees of said steamship negligently and carelessly pumped said oil overboard, and totally lost the same.

VIII.

That by reason of said improper stowage and said negligence in the care and custody of the cargo, libelants were damaged in the total sum of \$13,-224.68.

IX.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE libelants pray that process in due form of law according to the course of this Honorable Court in cases of admiralty and maritime jurisdiction may issue against said steamship "Korea Maru," her engines, boilers, boats, tackle,

[8] apparel and furniture, and that all persons having any interest therein may be cited to appear and answer on oath, all and singular the matters aforesaid, and that this Honorable Court would be pleased to decree the payment of the aforesaid damages, with interest, and that said steamship be condemned and sold to pay the same; and that libelants may have such other and further relief as in law and justice they may be entitled to receive.

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Proctors for Libelants.

State of California,

City and County of San Francisco,—ss.

Charles D. Willits, being first duly sworn, deposes and says:

That he is one of the libelants herein; that he has read the foregoing libel, knows the contents thereof, and believes the same to be true.

CHAS. D. WILLITS.

Subscribed and sworn to before me this 9th day of November, 1917.

[Seal]

FRANK L. OWEN,

Notary Public in and for the City and County of San Francisco, State of California. [9]

In the Southern Division of the United States District Court in and for the Northern District of California, First Division.

IN ADMIRALTY.

CHARLES D. WILLITS and I. L. PATTERSON,
Copartners Doing Business Under the Firm
Name of WILLITS and PATTERSON,
Libelants,

vs.

The Japanese Steamship "KOREA MARU," Her
Engines, Boilers, Boats, Tackle, Apparel and
Furniture,

Respondent.

**Interrogatories Propounded to Respondent and
Claimant Under Admiralty Rule No. 23.**

1. In what part of the steamship "Korea Maru" was said cocoanut oil stowed?
2. Where was said stowage place located in respect to the engine-room?
3. What was there, if anything, which separated the engine-room from the space in which said oil was stowed?
4. Were there any ventilators leading to the compartment in which said oil was stowed?
5. What was the breadth, width and height of the compartment?
6. On which deck of the vessel was it located?
7. How was the compartment covered over, or closed?

8. When so covered were there any means of circulating the air through the compartment?
9. If so, what were such means?
10. What became of the cocoanut oil which escaped from said barrels?
11. Where did the bottom of said cargo compartment drain to, [10] and if said cocoanut oil was pumped overboard, by what means was the same done?

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Proctors for Libelants.

[Endorsed]: Filed Nov. 9, 1917. W. B. Maling,
Clerk. By C. M. Taylor, Deputy Clerk. [11]

In the District Court of the United States of
America, Northern District of California.

IN ADMIRALTY—No. 16,302.

CHARLES D. WILLITS and I. L. PATTER-
SON, etc.,

Libelants,

vs.

The Japanese Steamer "KOREA MARU."

(Claim.)

To the Honorable Judges of the District Court of
the United States for the Northern District of
California:

The claim of Toyo Kisen Kaisha to the Japanese
steamer "Korea Maru," her tackle, apparel and

furniture, now in the custody of the marshal of the United States for the said Northern District of California, at the suit of Charles D. Willits and I. L. Patterson, copartners doing business under the firm name of Willits and Patterson, alleges:

That Toyo Kisen Kaisha, a corporation, is the true and *bona fide* owner of the said Japanese steamship "Korea Maru," her tackle, apparel and furniture, and that no other person is owner thereof.

WHEREFORE, this claimant prays that this Honorable Court will be pleased to decree a restitution of the same to Toyo Kisen Kaisha, a corporation, and otherwise right and justice to administer in the premises.

TOYO KISEN KAISHA,
By L. E. BEMISS,
Asst. Mgr.

Northern District of California,—ss.

Subscribed and sworn to before me this 9th day of Nov., A. D. 1917.

SAMUEL KNIGHT,
Proctor for Claimant.

[Seal] C. W. CALBREATH,
Deputy Clerk U. S. District Court, Northern District of California.

[Endorsed]: Filed Nov. 9, 1917. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [12]

District Court of the United States for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,302.

STIPULATION

Entered into *in* Pursuant to the Rules and Practice of this Court.

(Bond for Release of Vessel.)

WHEREAS, a libel was filed on the 9th day of November, in the year of our Lord one thousand nine hundred and seventeen, by Charles D. Willits et al. against the Japanese S. S. "Korea Maru," etc., for the reasons and causes in the said libel mentioned; and, whereas, the Japanese S. S. "Korea Maru," etc., is in the custody of the United States Marshal, under the process issued in pursuance of the prayer of said libel, and whereas the said Japanese S. S. "Korea Maru," etc., has been claimed by ——; and, whereas, it has been stipulated that said Japanese S. S. "Korea Maru," etc., may be released from arrest upon the giving and filing of an Admiralty Stipulation in the sum of Seventeen Thousand (17,000) Dollars, as appears from said stipulation now on file in said court; and the part— hereto hereby consenting and agreeing that, in case of default or contumacy on the part of the claimant or their sureties, execution for the above amount may issue against their goods, chattels and lands.

NOW, THEREFORE, the condition of this stipulation is such, that if the stipulators undersigned shall at any time, upon the interlocutory or final order or decree of the said District Court, or of any Appellate Court to which the above-named suit may proceed, and upon notice of such order or decree, to Samuel Knight and *and* F. G. Boland, Esquires, proctors for the claimant of said Japanese S. S. "Korea Maru," etc., abide by and pay the money awarded by the final decree rendered by the court or the Appellate Court if any [13] appeal intervene, then this stipulation to be void; otherwise to remain in full force and virtue.

TOYO KISEN KAISHA,

L. E. BEMISS,

Asst. Mgr.

UNITED STATES FIDELITY AND
GUARANTY COMPANY,

[Seal]

By H. V. D. JOHNS, Jr.,

Atty. in Fact.

Taken and acknowledged this 9th day of Nov.,
1917, before me.

[Seal]

FRANCIS KRULL,

United States Commissioner, Northern District of
California.

Northern District of California,—ss.

H. V. D. Johns, Jr., Atty. in fact for United States Fidelity and Guaranty Company, part— to the above stipulation, being duly sworn, depose and say, each for himself, that he is worth the sum of

thirty-five thousand dollars, over and above his just debts and liabilities.

H. V. D. JOHNS, Jr.

Sworn to this 9th day of Nov., 1917, before me.

[Seal]

FRANCIS KRULL,

United States Commissioner, Northern District of California.

Filed the 9th day of Nov., 1917. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [14]

In the Southern Division of the United States District Court in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,302.

CHARLES D. WILLITS and I. L. PATTERSON,
Copartners Doing Business Under the Firm
Name of WILLITS and PATTERSON,
Libelants,

vs.

The Japanese Steamship "KOREA MARU," Her
Engines, Boilers, Boats, Tackle, Apparel and
Furniture,

Respondent.

Answer.

To the Honorable the Judges of the United States District Court for the Northern District of California:

Now comes claimant herein and answers the libel

on file herein, admits and denies and alleges as follows:

I.

Admits the allegations contained in article one of said libel.

II.

Admits the allegations contained in article two of said libel.

III.

Admits that on or about the 7th day of July, 1917, there was delivered on behalf of libelants to the ship "Korea Maru" at the port of Manila, P. I., for transportation to and delivery at the port of San Francisco, California, 302 barrels of cocoanut oil weighing 136,677 pounds; admits that thereafter said steamship sailed upon said voyage and subsequently arrived at the port of San Francisco.

Alleges that claimant was and is ignorant as to the [15] then condition of said merchandise and whether it was in apparent good order or condition other than that certain of said barrels of cocoanut oil were leaking, and others thereof not leaking, were stained therefrom.

It denies, therefore, that any of said cocoanut oil or the barrels containing the same were in good order and condition, or good order or condition.

Denies that claimant, as the owner and operator of said steamship, agreed to deliver said merchandise at San Francisco in any other order or condition than as the same was when delivered to said steamship at Manila, P. I.

Admits that claimant failed to deliver all of said

cocoanut oil, but plaintiff does not know and has not been informed of the quantity thereof, and upon that ground denies that it failed to deliver any quantity thereof. Claimant has no knowledge whatever of the value of said cocoanut oil which it failed to deliver, if any, and upon that ground denies the same is of any value and calls for proof thereof.

Alleges that claimant as owner of said ship agreed to transport and deliver said merchandise as aforesaid in and by a bill of lading, and not otherwise, wherein and whereby it was agreed, among other things, after describing said merchandise, as follows:

“Leakage of contents at owner’s risk.”

Claimant alleges that the failure to deliver any quantity whatever of said cocoanut oil was due solely to leakage thereof.

IV.

Admits that on or about the 7th day of July, 1917, there was delivered by Carrero, Videl & Co. to said ship “Korea Maru” at the port of Manila, P. I., for transportation to and delivery at the port of San Francisco, California, forty barrels of cocoanut oil weighing 18,129 pounds; admits that thereafter said steamship sailed upon said voyage and subsequently arrived at the port of San Francisco. [16]

Alleges that claimant was and is ignorant as to the then condition of said merchandise and whether it was in apparent good order or condition other than that certain of said barrels of cocoanut oil

were leaking, and others thereof not leaking, were stained therefrom.

It denies, therefore, that any of said cocoanut oil or the barrels containing the same were in good order and condition, or good order or condition.

Denies that claimant, as owner and operator of said steamship, agreed to deliver said merchandise at San Francisco in any other order or condition than as the same was when delivered to said steamship at Manila, P. I.

Admits that claimant failed to deliver all of said cocoanut oil, but plaintiff does not know and has not been informed of the quantity thereof and upon that ground denies that it failed to deliver any quantity thereof. Claimant has no knowledge whatever of the value of said cocoanut oil which it failed to deliver, if any, and upon that ground denies the same is of any value and calls for proof thereof.

Alleges that claimant as owner of said ship agreed to transport and deliver said merchandise as aforesaid in and by a bill of lading and not otherwise, wherein and whereby it was agreed, upon other things, after describing said merchandise, as follows:

“Leakage of contents at owner’s risk.”

Claimant alleges that the failure to deliver any quantity whatever of said cocoanut oil was due solely to leakage thereof.

V.

Admits that on or about the 7th day of July, 1917, there was delivered by Carrero, Vidal & Co. to the ship “Korea Maru” at the port of Manila,

P. I., for transportation to and delivery at the port of San Francisco, California, 200 barrels of cocoanut oil weighing 90,911 pounds; admits that thereafter said steamship sailed upon said voyage and subsequently arrived at the port of San Francisco. [17]

Alleges that claimant was and is ignorant as to the then condition of said merchandise and whether it was in apparent good order or condition, other than that certain of said barrels of cocoanut oil were leaking, and others thereof not leaking, were stained therefrom.

It denies, therefore, that any of said cocoanut oil or the barrels containing the same were in good order and condition, or good order or condition.

Denies that claimant, as owner and operator of said steamship, agreed to deliver said merchandise at San Francisco in any other order or condition than as the same was when delivered to said steamship at Manila, P. I.

Admits that claimant failed to deliver all of said cocoanut oil, but plaintiff does not know and has not been informed of the quantity thereof and upon that ground denies that it failed to deliver any quantity thereof. Claimant has no knowledge whatever of the value of said cocoanut oil which it failed to deliver if any and upon that ground denies the same is of any value and calls for proof thereof.

Alleges that claimant as owner of said ship agreed to transport and deliver said merchandise as aforesaid in and by a bill of lading and not otherwise wherein and whereby it was agreed upon

other things, after describing said merchandise, as follows:

“Leakage of contents at owner’s risk.”

Claimant alleges that the failure to deliver any quantity whatever of said cocoanut oil was due solely to leakage thereof.

VI.

Admits the allegations contained in article six.

VII.

Denies that said cocoanut oil was or is an article which required stowage in a cool and ventilated cargo compartment of said steamship for its proper or safe carriage; or that said [18] cocoanut oil required any other stowage than that usually given, and which was in fact supplied by claimant on said steamship. Denies that said cocoanut oil was improperly stowed in tanks in the after part of said steamship or immediately adjoining the engine-room, or at all improperly stowed. Denies that said oil was subjected to heat or was without proper or efficient ventilation; on the contrary, plaintiff alleges that said oil was not subject to any greater heat than that which is usually encountered at that time of the year, i. e., July, and the ordinary temperature of the P. I. and the usual course to the port of San Francisco; on the contrary, claimant alleges that there was sufficient ventilation to said oil. Denies that by reason of any improper stowage or any negligent or any act on the part of claimant said oil was caused to liquefy or to escape from the barrels in which it was contained; on the contrary, claimant alleges that cocoanut oil is a

commodity which easily liquefies under the ordinary heat of summer in the Philippines and on the usual course to the port of San Francisco and will when so liquefied escape from the barrels or containers unless the same be so constructed as to prevent such leakage. Claimant alleges upon information and belief that the barrels containing said cocoanut oil were not sufficient to prevent the leakage of the contents thereof when liquefied, and that by reason thereof and not otherwise the contents thereof leaked therefrom. Denies that the officers or crew or employees of claimant negligently or carelessly pumped any of said oil overboard or totally lost the same; on the contrary, claimant alleges that upon the leaking of any thereof same flowed into the bilge and was thence necessarily pumped overboard.

SAMUEL KNIGHT,
F. ELDRED BOLAND,
Proctors for Claimant. [19]

State of California,
City and County of San Francisco,—ss.

K. Doi, being first duly sworn, deposes and says: That he is an officer, to wit, manager of Toyo Kisen Kaisha, claimant herein and makes this verification on its behalf; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge except as to those matters that are therein stated on information or belief, and as to those matters he believes it to be true.

K. DOI.

Subscribed and sworn to before me this 16th day of September, 1918.

[Seal]

JOHN E. MANDERS,

Notary Public in and for the City and County of San Francisco, State of California. [20]

Answers to Interrogatories Propounded by Libellants Herein.

Claimant answers Interrogatory No. 1 as follows:

In hold No. 5.

Claimant answers Interrogatory No. 2 as follows:

Immediately aft the engine-room.

Claimant answers Interrogatory No. 3 as follows:

The engine-room was separated from hold No. 5, in which the oil was stored, by a steel bulkhead in 9½ air space and then a wooden bulkhead 2" thick, furnishing complete insulation.

Claimant answers Interrogatory No. 4 as follows:

There were two ventilators leading to hold No. 5, which passed through the cold-storage compartment.

Claimant answers Interrogatory No. 5 as follows:

The dimensions of hold No. 5, where the oil was stored, are as follows: Breadth 28' 4"; width 24' 2"; height 9' 7".

Claimant answers Interrogatory No. 6 as follows:

Orlop-deck.

Claimant answers Interrogatory No. 7 as follows:

The compartment was closed by wooden hatch boards.

Claimant answers Interrogatory No. 8 as follows:

When so covered, air was circulating through the compartment by means of ventilators and through the thrust recess.

Claimant answers Interrogatory No. 9 as follows:

See answer to our Interrogatory No. 8.

Claimant answers Interrogatory No. 10 as follows:

If any escaped it went into scuppers and thence into the barrels.

Claimant answers Interrogatory No. 11 as follows:

The bottom of said hold No. 5 drained into scuppers, thence into barrels, and if any oil escaped, it was pumped into [21] the barrels by means of bilge pumps.

Interrogatories to be Propounded to Libelants.

1. a. By whom were the barrels in which the cocoanut oil was stored fabricated?
b. Of what materials were same fabricated?
c. Where were same fabricated?
d. How many hoops on each barrel and where placed and how fastened?
e. Was anything done to reduce porosity of barrels such as calcining?
2. a. What grade of cocoanut oil was in the shipment involved in this case?
b. What was the price paid per pound for same?
c. From whom was same purchased?
3. a. At what degree of temperature does cocoanut oil similar to that involved in this shipment liquefy?
b. What is the water content of said cocoanut oil?

- c. When liquid, does it tend to shrink or swell wood of the character used in said barrels?

[Endorsed]: Due service and receipt of a copy of the within answer, answers to interrogatories of libelant and interrogatories propounded to libelant by claimant is hereby admitted this 1st day of October, 1918.

McCUTCHEN, OLNEY & WILLARD,
Proctors for Libelant.

Filed Oct. 1, 1918. W. B. Maling, Clerk. By
T. L. Baldwin, Deputy Clerk. [22]

In the Southern Division of the United States
District Court in and for the Northern District
of California, First Division.

IN ADMIRALTY—No. 16,302.

CHARLES D. WILLITS and I. L. PATTERSON,
Copartners Doing Business Under the Firm
Name of WILLITS and PATTERSON,
Libelants,

vs.

The Japanese Steamship "KOREA MARU," Her
Engines, Boilers, Boats, Tackle, Apparel and
Furniture,

Respondent.

**Further Answer to Interrogatories Propounded by
Libelants.**

Claimant answers interrogatory No. 1 as follows:

“Said cocoanut oil was stowed in hold No. 5 and hold No. 7.”

SAMUEL KNIGHT,
F. E. BOLAND,
Proctors for Respondent.

[Endorsed]: Due service and receipt of a copy of the within further answer to interrogatories is hereby admitted this 12th day of December, 1918.

McCUTCHEN, OLNEY & WILLARD,
Proctors for Libelants.

Filed Dec. 19, 1918. W. B. Maling, Clerk. By
C. W. Calbreath, Deputy Clerk. [23]

In the Southern Division of the United States
District Court in and for the Northern District
of California, First Division.

IN ADMIRALTY—No. 16,302.

CHARLES D. WILLITS and I. L. PATTERSON,
Copartners Doing Business Under the Firm
Name of WILLITS and PATTERSON,
Libelants,

vs.

The Japanese Steamship “KOREA MARU,” Her
Engines, Boilers, Boats, Tackle, Apparel and
Furniture,

Respondent.

TOYO KISEN KAISHA,

Claimant.

(Answers to Interrogatories Propounded by Claimant.)

Comes now libelants above named and in answer to interrogatories propounded by claimant, answer as follows:

In answer to Interrogatory 1a, libelants answer:

San Miguel Mill.

In answer to Interrogatory b, libelants answer:

California fir.

In answer to Interrogatory c, libelants answer:

San Miguel, P. I.

In answer to Interrogatory d, libelants answer:

Eight hoops with fasteners attached to barrels.

In answer to Interrogatory e, libelants answer:

Yes, glued.

In answer to Interrogatory 2a, libelants answer:

Fair, merchantable Manila.

In answer to Interrogatory b, libelants omit answer by stipulation.

In answer to Interrogatory c, libelants answer:

San Miguel Mill.

In answer to Interrogatory 3a, libelants answer:

[24]

75 to 80%.

In answer to Interrogatory 3b, libelants answer:

About 1%.

In answer to Interrogatory c, libelants answer:

Do not know.

CHARLES D. WILLITS and
I. L. PATTERSON,

Copartners Doing Business Under the Firm Name
of Willits and Patterson.

McCUTCHEN, OLNEY & WILLARD,
Proctors for Libelants.

State of California,

City and County of San Francisco,—ss.

Charles D. Willits, being first duly sworn, deposes
and says:

That he is one of the libelants in the above-entitled
matter; that he has read the foregoing answers to
the interrogatories propounded by claimant, and
knows the contents thereof, and that the same is
true of his own knowledge and belief.

CHAS. D. WILLITS.

Subscribed and sworn to before me this 6th day
of February, 1919.

[Seal]

FRANK L. OWEN,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Service of the within answers to
interrogatories and receipt of a copy is hereby ad-
mitted this 6th day of February, [25] 1919.

SAMUEL KNIGHT,
F. E. BOLAND,
Proctors for Respondent.

Filed Feb. 7, 1919. W. B. Maling, Clerk. By
C. M. Taylor, Deputy Clerk. [26]

In the Southern Division of the United States
District Court in and for the Northern District
of California, First Division.

IN ADMIRALTY—No. 16,302.

CHARLES D. WILLITS and I. L. PATTERSON,
Copartners Doing Business Under the Firm
Name of WILLITS and PATTERSON,
Libelants,

vs.

The Japanese Steamship "KOREA MARU," Her
Engines, Boilers, Boats, Tackle, Apparel and
Furniture,

Respondent.

TOYO KISEN KAISHA,

Claimant.

Amendment to Libel.

Come now libelants in the above-entitled matter,
and after leave of Court had in that behalf, amend
their libel on file herein as follows:

I.

Strike out the words "by said heat to liquefy and,"
appearing on line 25, page 3 of said libel.

McCUTCHEN & WILLARD,

Proctors for Libelants.

IT IS HEREBY STIPULATED that the verifi-
cation to the foregoing amendment be and the same

is hereby expressly waived.

McCUTCHEN & WILLARD,
Proctors for Libelants.
SAMUEL KNIGHT and
F. E. BOLAND,

Proctors for Respondent and Claimant. [27]

[Endorsed]: Service of the within amendment to libel and receipt of a copy is hereby admitted this 21st day of May, 1919, reserving exception, however, to the order of the Court allowing the amendment.

SAMUEL KNIGHT and
F. E. BOLAND,

Proctors for Claimant.

Filed May 21, 1919. W. B. Maling, Clerk. By
C. W. Calbreath, Deputy Clerk. [28]

In the Southern Division of the United States
District Court in and for the Northern District
of California, First Division.

IN ADMIRALTY—No. 16,302.

Before Hon. EDWARD F. CUSHMAN, Judge.
CHARLES D. WILLITS and I. L. PATTERSON,
Copartners Doing Business Under the Firm
Name of WILLITS and PATTERSON,
Libelants,

vs.

The Japanese Steamship "KOREA MARU," Her
Engines, Boilers, Boats, Tackle, Apparel etc.,
Respondent.

TOYO KISEN KAISHA, a Corporation,
Claimant.

(Testimony Taken in Open Court.)

Tuesday, March 25th, 1919.

Counsel appearing:

JOSEPH B. McKEON, Esq., for the Libelant.

F. E. BOLAND, Esq., for the Respondents.

Mr. McKEON.—This is an action for damage to cargo, a shipment of cocoanut oil, loaded at Manila, and bound for San Francisco, and carried by the Japanese steamship “Korea Maru.” The cargo was stowed in two different compartments on the ship; most of it was stowed in what will be described here as No. 5 [29] tank, No. 5 tank being a portion of No. 5 hold; the balance of the cargo, a small portion of it, was stowed in No. 7 hold, No. 7 hold being a considerable distance away from No. 5 tank. No. 5 tank, where the most of the damage occurred, and where most of the cargo was stowed was directly abaft of the engine-room, and separating the engine-room from this steel tank compartment, where this oil was stowed, was a steel bulkhead, and separating the steel bulkhead from the cargo were what is known as cargo battens, the lattice-work; it is not a solid wooden bulkhead at all; I have photographs of that compartment, so that that will be clear.

Our contention is that the ship is liable for the damage because of negligence and improper stowage; that No. 5 tank was an improper place to carry cocoanut oil. Cocoanut oil is a commodity that requires free ventilation; and that there was abso-

lutely not a bit of air in this No. 5 tank where this oil was stowed.

The COURT.—Is the tank an open top tank?

Mr. McKEON.—No, the tank is a square compartment, and the only opening into it is on the hatch above; the tank is located on the lowest portion of the ship, elevated from the lower hold. The “Korea Maru” is a very large ship and has several decks; on took of the floor of the engine-room and raised is this tank; that you might describe as the deck. On top of that is the ’tween-decks; on the ’tween-decks there is a hatchway which opened into this No. 5 tank. The cargo loaded into No. 5 tank, as testified to by the first officer and master of the ship in the depositions, is lowered right through the hatch down into this cargo compartment; it is lowered like that, and swung into the hold; the testimony [30] already taken shows that the only opening into this compartment is through this hatchway. The testimony already taken shows that over this tank, and the only opening into it, they had hatch boards, and on top of the hatch boards they had seven feet of cargo; that took it to the ceiling of the next deck, the ’tween-decks, then of course they had cargo stowed up to the main deck, and then the main deck has a main hatchway, which is the main opening into the hold.

The COURT.—The hatch to the ’tween-decks was opened or closed?

Mr. McKEON.—Was closed; in other words, the No. 5 tank, where this cargo was stowed, was completely covered over with hatch boards and on top

of the hatch boards seven feet of cargo.

The COURT.—What kind of cargo?

Mr. McKEON.—Cocoanut oil, barrels of cocoanut oil. The floor of the tank is steel, and surrounding it there is steel except that there are two wooden bulkheads, two solid wooden bulkheads as the photographs will disclose, separating the water tanks, fresh-water tanks, on either side of this compartment.

Those tanks we propose to show did not contain cold water, as the master and chief officer testified, but contained hot water. We also propose to show that all of the heat from the engine-room would reach this compartment, and that the two emergency escapes which pass through this No. 5 tank, which have been referred to by the first officer of the ship and the master as ventilators are not ventilators, and are not intended for ventilation, and never ventilated that compartment at all. They have opening into this No. 5 tank and these two emergency escapes two steel doors which were the [31] same size as one of the sides of this escape; that door is five feet high and the width of the square emergency escape, this being a steel emergency escape passing through the thrust recess in the engine-room clean through to the top deck, and on the top deck instead of having a ventilator top, it has what is known as a mushroom top, which is an out-take and not an in-take for fresh air at all; there are two of the steel emergency escapes in the ship, and they both pass through this No. 5 tank where this cargo was stowed. The ship's testimony already taken was

to the effect that these 5-foot doors that I speak of were open, and that that gave plenty of ventilation to this cargo. I propose to show they were not open, but taking their own testimony as it is, if they were open, it would be worse because the hot air from the engine-room would pass through these out-takes and through these open doors into this compartment and make that compartment hotter than it otherwise would have been. But, assuming that the doors were closed, which I propose to show, the hot air passing up from the engine-room—and, mind you, this opened right into the engine-room—would heat these steel emergency escapes and the steel of course would throw the heat into this cocoanut oil just the same as the engine-room would.

The ship signed clean bills of lading for this cargo at Manila. The cargo was delivered in a damaged condition here; many of the barrels coming out of the No. 5 were absolutely empty; all of them were dripping. We could see daylight through some of the openings in the barrels, and the hoops were loosened. The effect of the heat on barrels is to retract the barrel, causing the oil to expand and it is bound to get out. It did get out of these barrels, and the tanks, which of course have a steel [32] bottom to them did not retain the oil; it passed out through the scuppers into the bilges and was pumped probably overboard. A long time after the ship was libeled—I don't know how many months afterwards—we were told that they had collected some of that oil that had escaped from these barrels—we don't know whether it was our

oil or not, but we took some of it, and gave them credit for the oil that they said they had recovered from the cocoanut oil.

On the law of the case, I do not think there is going to be much room for argument. The principles are very well settled. The bill of lading upon which the other side rely provided that the leakage of contents was at owner's risk. I cheerfully assume the burden that that throws upon me of proving negligence. And the negligence I propose to show is improper stowage and unseaworthiness in the respect of the carriage of that oil.

The answer admits the delivery of the oil to the ship and in the quantities pleaded, and denies contents of the barrels. Certain stipulations have been entered into to expedite some of these matters, and I will introduce those in regular order. The defense that the ship has pleaded is as I say the bills of lading were, leakage at owner's risk, and an allegation that the containers were not sufficient. I think that practically covers the situation. Is there anything else, Mr. Boland?

Mr. BOLAND.—For your side that is a fair statement, Mr. McKeon.

Mr. McKEON.—Do you want to make a statement now?

Mr. BOLAND.—I think, your Honor, Mr. McKeon has covered our defense, that is, that the damage, if any, was caused by leakage of the contents of the barrels, which it is pleaded [33] was due to heat, causing it to liquefy and thus escape from

(Testimony of John H. Rinder.)

the containers. The bills of lading except liability for leakage, which completely exonerates the carrier, when libelant shows that their injury occurred only through the excepted clause of leakage.

Testimony of John H. Rinder, for Libelant.

JOHN H. RINDER, called for the libelant, sworn.

Mr. McKEON.—Q. Captain, what is your profession?

A. Master mariner before and Nautical Surveyor now—marine surveyor.

Q. How long have you been a master mariner?

A. How long have I been a master mariner or been to sea altogether, your mean?

Q. Yes. A. About 34 years.

Q. You were master of Pacific Mail liners, were you not? A. Yes.

Q. What is your present occupation, Captain?

A. Marine surveyor.

Q. How long have you been engaged as such?

A. About eleven years.

Q. Did you make an examination of the steamship "Korea Maru"?

A. That one particular compartment where the oil was carried?

Q. No. 5 tank? A. Yes.

Q. Captain, assume that that compartment had cocoanut oil stowed in it in barrels, and that the hatch above was covered over with hatch boards, and on top of the hatch boards there was seven

(Testimony of John H. Rinder.)

feet of cargo stowed in the 'tween-deck above, to the ceiling of the 'tween-decks, would that cargo get any ventilation?

A. No; no means of ventilation at all.

Q. Did you notice the two emergency escapes passing through [34] No 5 tank? A. Yes.

Q. What are they—are they ventilators?

A. No, certainly not; they are steel doors fitted with clamps to make them practically air-tight—practically air-tight.

Q. How tall are they?

A. I did not measure them; I guess they are about 5 feet high; somewhere about that.

Q. Is that an ordinary opening of the ventilator into any cargo compartment that you have ever seen. A. No.

Q. Assume, Captain, that these doors just described in these emergency escapes were open at the time that that cargo was stowed in there, what is the effect, or, rather, what air would pass into that compartment through those doors, hot air or cold air?

A. The hot air rising from the engine-room.

Q. What sort of opening have those emergency escapes on the top deck.

A. Mushroom ventilators—mushroom tops.

Q. What is the common expression for ventilators with mushroom tops?

A. Up-take ventilators.

Q. In other words, they do not permit the air to go down?

(Testimony of John H. Rinder.)

A. They do not permit the air to go down.

Q. They take the hot air out from below?

A. The hot air from below as it rises.

Q. In your opinion was that a proper place to stow cocoanut oil? A. No.

Mr. BOLAND.—I do not think you have qualified the captain to testify as to cocoanut oil; he is a master mariner and he has not testified to any familiarity with cocoanut oil.

Mr. McKEON.—Q. Have you supervised the stowage of cargo in the “Korea Maru”?

A. Yes.

Q. You have had a great deal to do with cocoanut oil, haven’t you, Captain?

A. In the last year or two; yes. [35]

Q. Is cocoanut oil a commodity that requires free ventilation? A. Certainly.

Q. Now, Captain, I will ask you whether or not that cargo compartment, without any air in it at all, without any ventilation, is a proper place for the stowage of cocoanut oil? A. I say certainly not.

Q. Have you examined No. 7 hold of the “Korea Maru”? A. No.

Q. Are you familiar with No. 7 hold at all?

A. I know just about what it is like, right in the run of the ship.

Q. It has ventilators, hasn’t it?

A. That I did not notice.

Q. Captain, assume that the fresh-water tanks alongside of the No. 5 tank had hot water in them, would that have a tendency to heat No. 5 tank?

(Testimony of John H. Rinder.)

A. Certainly; the hot-water tanks on each side are bound to heat it.

The COURT.—What size are these?

Mr. McKEON.—They are a different tank altogether. This particular tank where No. 5 is between round tanks.

The COURT.—But the cubic contents of the water-tank would bear about what relation to the cubic contents of No. 5 tank?

Mr. McKEON.—I don't know. I can probably get that.

The COURT.—Just roughly.

The WITNESS.—I think it would be about one-third—something like that.

The COURT.—The witness says the water tanks would be about one-third the contents of the other.

Mr. McKEON.—I think he is in error on that. The fresh-water tanks I think are larger.

The COURT.—If you will have other witnesses to that, that will be sufficient. [36]

Mr. McKEON.—Q. Would the hot air passing from the engine through these emergency escapes have a tendency to heat that compartment?

A. Certainly; it would heat the four sides of the steel escape.

Q. What are the purposes, Captain, if you know, do these emergency escapes serve on a ship?

A. They are not supposed to serve any other purpose—they are supposed to be an escape from the engine-room.

Q. That is the purpose I wanted—the escape

(Testimony of John H. Rinder.)

from the engine-room. That is all.

The COURT.—Q. An escape for what?

A. For a man in case of trouble down below.

The COURT.—I understand now. I did not know whether it was an escape for hot air or for human beings.

Mr. McKEON.—They have an iron ladder.

The WITNESS.—They have iron ladders up into it.

The COURT.—I understand.

Cross-examination.

Mr. BOLAND.—Q. You were with the Pacific Mail, were you? A. At one time.

Q. For many years?

A. Not very long. I was with the O. & O. Company, practically the same thing, for a great many years.

Q. At what period were you employed by the Pacific Mail? A. In 1904 and 1905.

Q. What vessel did you command?

A. The "Mongolia."

Q. The "Mongolia"? A. Yes.

Q. What is the tonnage of the "Mongolia"?

A. About 14,000.

Q. For the O. & O., what vessel did you command? A. The "Coptic," the "Belgic."

Q. What size vessel was that?

A. About 4,500.

Q. And the "Mongolia" is 14,000?

A. Yes. And after that the "Minnesota," 21,000. [37]

(Testimony of John H. Rinder.)

Q. On the "Mongolia," did you carry any cocoanut oil? A. No.

Q. Never carried any? A. No.

Q. On the "Minnesota," did you carry some?

A. No.

Q. Did you ever carry any on the "Coptic"?

A. No.

Q. You never carried any cocoanut oil on any vessel of which you were in command?

A. Not that I know of.

Q. Then, so far as practical knowledge, as a master mariner, in command of vessels, is concerned, you don't know whether this was a proper place to stow cocoanut oil or not.

A. No, but from my last two years' experience here as a marine surveyor, I have learned a good deal about handling it.

Q. We can eliminate the 35 years' experience and get down to the last two years, then. What is the liquefying point, Captain, of cocoanut oil?

A. That I cannot tell you.

Q. You don't know? A. No.

Q. Do you know what period of the year this cocoanut oil was shipped? A. No.

Q. You don't know whether it was winter or summer? A. No.

Q. Assume, Captain, that the cocoanut oil was shipped in the winter, we will say—I will withdraw that question. If you don't know the liquefying point of cocoanut oil, how can you say that it was improperly stowed in hold No. 5?

(Testimony of John H. Rinder.)

A. From the experience I have had in the last two years, seeing cargoes come out of different ships something like the same condition, owing to extreme heat.

Q. You say you don't know whether there was any ventilation of hold No. 7 or not?

A. No; I did not look in hold 7.

Q. Do you know, as a matter of fact, whether the oil that came out in this particular cargo from hold 7 was in substantially the same condition as that from hold 5 or not?

A. I know nothing about the condition of the cargo when it came out.

Q. You did not see it?

A. I did not see it. [38]

Q. Your statement that hold 5 was an improper place is based upon what?

A. My practical knowledge of the heat that would be generated from the engine-room all around that compartment.

Q. But you don't know at what temperature oil liquefies, Captain.

A. I know there is heat enough from that engine-room to liquefy that oil.

Q. What is the heat of the engine-room?

A. Even if it is stowed in one of the other holds, sometimes it will liquefy, when the weather is very warm.

Q. When the water is very warm? A. Yes.

The COURT.—Which, weather or water?

(Testimony of John H. Rinder.)

A. When the water and weather is warm, at Manila, for instance.

Mr. BOLAND.—Q. Then, if it liquefies in other holds, ventilation really hasn't anything to do with it?

A. Yes, it has; you are not using due diligence if you put it into a place that is heated as that was.

Q. You are not?

A. Not in my opinion, as hot as that was.

Q. Will you now refer to some of the vessels that you have seen in the last two years to which you have just made reference?

A. The "L'Avenir" in this port discharged cargo like that; she has no engines.

Q. She is a sailing vessel?

A. A sailing vessel, but she has got tanks.

Q. Was there leakage in the "L'Avenir"?

A. Yes, bad leakage.

Q. There was no engine-room there? A. No.

Q. What caused it there?

A. It was stowed in loose copra—the barrels were stowed in loose copra.

Q. Did you take the temperature of that loose copra? A. No.

Q. You don't know what temperature it was?

A. No. [39]

Q. Why did the loose copra cause it to leak?

A. Copra always generally does heat, practically always heats.

Q. But you don't know whether this was hot or not in this particular "L'Avenir"?

(Testimony of John H. Rinder.)

A. Yes, I do happen to know it, because I had my hand in it.

Q. You don't know what temperature it was?

A. No.

Q. Did you go into the forward hold of the "L'Avenir"? A. Yes.

Q. What was the temperature of the copra in the forward hold as compared to the after hold of the "L'Avenir"?

A. There was a lot of salt water in the forward hold of the "L'Avenir," and she was smoking.

Q. She was much hotter in the forward hold, was she not? A. Yes.

Mr. McKEON.—I don't think we are trying the "L'Avenir" case, but the "Korea Maru."

The COURT.—I sustain the objection.

Mr. BOLAND.—Q. Your reference to the "L'Avenir" is without any reference to actual temperature, then, except as you felt it?

A. Certainly.

Q. Name some other vessel, Captain?

A. I don't know as I could, offhand; I have not had one case where cocoanut oil was stowed in a compartment like that on the "Korea," subject to the action of such great heat as would be generated around that tank in No. 5 in the "Korea."

Q. It is the fact that cocoanut oil liquefies that causes it to leak from the barrels, is it not, Captain?

A. Of course, the barrels shrink and the hoops will loosen up.

(Testimony of John H. Rinder.)

Q. Did you see the barrels in this particular case?

A. No, I told you I did not; I did not see the cargo.

Q. Did you see the "Flying Cloud"?

A. I did.

Q. Were you employed on that case, Captain?

A. I was.

Q. Do you know the temperature of the oil in that? A. No. [40]

Q. There was leakage there?

A. Yes, considerable.

Q. The "Ten Paisen Maru," do you know anything about that? A. Yes.

Q. The same leakage there, was there not?

A. Yes.

Q. In the "Ten Paisen Maru," was it packed in loose copra? A. No.

Q. What caused the leakage there, in your judgment? A. Heat, I suppose.

Q. You suppose heat? A. Yes.

Q. Have you any other opinion?

A. Yes, I have, but I don't think you have any right to bring that up, as that case is coming into court.

Mr. McKEON.—If your Honor please, that is another case that I happen to be interested in, and I do not want to try it here at this time.

The COURT.—The objection is sustained.

Mr. BOLAND.—Q. If the barrels do not shrink,

(Testimony of John H. Rinder.)

Captain, will there be shrinkage of the cocoanut oil?

A. If the barrels do not shrink?

Q. Yes, and the oil is liquefied.

A. If the oil is liquefied and the barrels leak, the oil is going to escape.

Q. But if the barrels are tight when the oil is put in, and they do not thereafter shrink, will there be any leakage of oil from the barrels?

A. I suppose not, if they remain in the same state as when they were tight, I do not see why they should leak.

Q. Then, the mere fact that the oil liquefies, Captain, is not the cause of leakage?

A. It may be because of faulty barrels.

Q. My two questions have to be answered together, more or less, Captain; assuming that the oil is liquefied when it is put into the barrel, and the barrel is in good condition and the barrel [41] does not thereafter shrink, there will be no leakage. That is a fact, is it not?

A. There should not be

Q. Then, the mere fact that the oil is liquefied is not the cause of the leakage. Is that the fact? It is the shrinkage of the barrel which causes the leakage, is it not?

A. The heat that the oil generates shrinks the barrel.

Q. It is the shrinkage of the barrel, and not the liquefying of the oil which causes the leakage?

A. The hoops loosen.

(Testimony of John H. Rinder.)

The COURT.—The Court will take judicial notice of the fact it would not leak if it was not liquid.

Mr. BOLAND.—If your Honor catches the drift of the question, it would have to be liquid, and there would have to be a hole in the barrel before it leaked out. Those two things would have to exist. I will call your Honor's attention to the libel in this case, and it will perhaps illustrate what I was getting at. "That by reason of said improper stowage and said negligent care of said cargo, said cocoanut oil was caused by said heat to liquefy and to escape from the barrels in which same was contained to the bottom of said tanks in which it was stowed."

There is not a word in this libel to the effect that anything ever caused the barrels to shrink, and we are not put upon notice that there is going to be a claim in this case that the heat was so great as to cause the barrels to shrink; consequently, unless the libelant can prove that the liquefaction of the oil caused his loss, then he must either amend his libel or he fails in this case.

The COURT.—Proceed.

Mr. McKEON.—The fact is simply this, that these barrels, because of the heat, retracted, the oil expanded, and it has got to get out. [42]

The COURT.—Are you through with your other examination?

Mr. BOLAND.—No. I am proving by this witness exactly the point I am making.

Mr. McKEON.—I think it is proper to state, in

(Testimony of John H. Rinder.)

view of what he has said, it is our contention we do not have to show whether it got out because the barrel shrunk or because the oil expanded; it was in there and it got out because of the negligence of the ship, and it is up to them to show which is which.

Mr. BOLAND.—On the contrary, the opening statement, which we may take as true to that extent, is that the bills of lading in this case except injury by leakage. Therefore, the burden is upon the libelant to prove, as he stated to your Honor, negligence in stowing—the negligence that he alleges is leakage by reason of liquefaction, and there is not a word that th barrels were caused to shrink.

Mr. McKEON.—We do not have to allege it.

The COURT.—That is something to argue when you get your evidence in.

Mr. BOLAND.—For that reason, my evidence that I was bringing out by this witness is absolutely competent under my construction of the pleadings in this case.

The COURT.—I have simply stated I do not see how anything of this nature would leak as long as it was solid. Of course, there is no evidence yet that its liquefaction makes it expand. Of course, if it was barreled up tight and liquefaction did make it expand, naturally, the pressure would be greater.

Mr. BOLAND.—As to that, Mr. McKeon is laboring under some difficulty in going to trial this

(Testimony of John H. Rinder.)

afternoon, and I have [43] not made any objection to the answer of the witness based on something that I think is not in evidence. Otherwise, I would have drawn out the examination interminably. I think Mr. McKeon realizes that, and that is the reason for that. Will you read the question?

(The last question and answer repeated by the reporter.)

Q. Will you answer the question directly, Captain? Your answer is rather a negative answer. Will you read the question again, and then you can answer it, Captain.

(The last question repeated by the reporter.)

A. What is it you wish?

Q. That is, the cause of the leakage is the shrinkage of the barrel, and not the mere fact that the oil is liquefied?

A. It is shrinkage—the heat of the hot oil shrinks the barrel.

Q. That is what causes the leakage?

A. In some cases; of course, there may be a defect in the barrel.

Q. If the barrel remained tight there would be no leakage. That is the conclusion, is it?

A. That would be a sane conclusion to arrive at.

Q. What heat, Captain, will cause a barrel to shrink, what temperature?

A. That I cannot tell you; I am not an expert cooper.

Q. How many shipments have come in, in your

(Testimony of John H. Rinder.)

experience at this port, in the last two years, where there has been no leakage?

A. It would be very difficult to give an answer to that question.

Q. Have there been any?

A. I don't know that I can recall them.

Mr. McKEON.—The captain, probably, would not hear of them unless there was leakage.

A. I could not answer that; it is too general a question to ask; [44] I could not answer it.

Mr. BOLAND.—Q. Have there been any that you know of coming into port in the last two years where there has been no leakage?

A. Yes, there have been some cases come in without any leakage at all.

Q. Isn't there always a normal amount of leakage in cocoanut oil?

A. No, I think some cases come in with absolutely clean discharges.

Q. Is that merely a thought on your part, or is it knowledge?

A. I am telling you I cannot specify any particular case, any specific case.

Q. I will put it in the affirmative: Isn't it a fact that there is always a normal or a small or normal amount of leakage in cocoanut oil shipments?

A. You might put it that it generally is, not always.

Q. Do you know what that normal leakage is?

A. Average, you mean?

Q. Yes, you might take the average or normal.

(Testimony of John H. Rinder.)

A. No, I would not put myself on record as naming any figure for that.

Q. You would not want to say it was 1 or 5 per cent? A. No.

Q. Do you know, Captain, the effect, if any, of cocoanut oil—by the way, what are these barrels made of, first?

A. I don't know. I told you I did not see the barrels.

Q. I mean any barrels that are coming into port.

A. Some of them are made of pine and some of them made of oak.

Q. Assume a pine barrel: Do you know the effect, if any, of the oil on the barrel independent of the application of sufficient heat to liquefy the oil such as it is when put in?

A. That is a question the answer to which has been very anxiously sought after all over this city in commercial circles, and I have not yet met a man who could give [45] an answer to it.

Q. Will you elaborate that, to some extent?

A. I cannot elaborate it, because I don't know anything about it, and I can't find anybody who can tell.

Q. There is some effect, then, on barrels, pine barrels, by oil, is there? A. We think there is.

Q. What are the views about it, *pro* and *con*?

A. I cannot say what is thought of it generally. I have had a great deal of experience with it, and I would very much like to know what the cause is

(Testimony of John H. Rinder.)

myself, but I have not met any chemist, even, who could tell you what it is.

Q. Tell me what the ideas are, *pro* and *con*, about town; the merchants would like to know, and I think his Honor would like to know.

A. I would, if I could tell you anything. I am saying I cannot tell you anything, because I do not know.

Q. What are the two views?

A. There are more than two; there are a good many views. I would not bring that question up now.

Q. I am asking you for it.

Mr. McKEON.—I don't know whether that is a proper way to prove it.

A. I am simply telling you I cannot give you any light on the subject, because I do not know myself.

Mr. BOLAND.—Q. Is it a fact, Captain, that some people in town think that cocoanut tends in itself to shrink a pine barrel?

Mr. McKEON.—If your Honor please, I do not think that is a proper way to prove that.

The COURT.—Some people in town might not know any more about it than I do.

Mr. BOLAND.—But the Captain is dealing with people who do.

The COURT.—Your question did not put it exactly that way. [46] I sustain the objection to the question in its present form.

Mr. BOLAND.—Q. Dealing with these persons

(Testimony of John H. Rinder.)

who are also interested as you are, or as you say you are, in cocoanut oil shipments, among merchants, marine surveyors, etc., in San Francisco, is it not a fact that among those persons, the cognoscenti, we will call them—isn't it a fact that many of them hold the view, and so express it, that cocoanut oil causes a shrinkage of a pine barrel?

A. Yes, and an oak barrel, too.

Q. And an oak barrel, too?

A. Yes; a great many people say so, but nobody knows what they are talking about, to give an answer to go on record with, nobody that I have met.

Q. That is what I wanted as an answer, and that is what I understood to be the fact. That is all.

Redirect Examination.

Mr. McKEON.—Q. Was No. 5 tank a fit compartment for the carriage of any cargo that required ventilation? A. In my opinion, no.

Q. Whether cocoanut oil or not?

A. Cocoanut oil, or not.

Q. Captain, in your experience, in dealing with cocoanut oil, have you or have you not formed the conclusion that ventilation is imperative?

A. Certainly.

Q. And heat is dangerous?

A. Unquestionably.

Mr. McKEON.—That is all.

Recross-examination.

Mr. BOLAND.—Q. Assume that there was ventilation in hold No. 7 on the "Korea Maru," and that

(Testimony of John H. Rinder.)

the oil from that hold came out in substantially the same condition as the oil from hold 5, would you say that hold 7 was an improper place to stow cocoanut, as well as hold 5?

A. No, I should still maintain that No. 5 hold was an absolutely improper place to stow cargo [47] of that nature.

Q. If the oil from hold 7 was in the same condition, approximately, and hold 7 was ventilated, would your conclusion be that hold 7 was an improper place to stow? A. No.

Q. Will you explain your answer?

A. No. 5 tank, as now constructed, in my opinion, is not fit to carry anything that would be damaged by heat, excessive heat that would come in hot weather going through the tropics, as this ship does, from the engine-room. No. 7 hold is a totally and absolutely different proposition. It is away from the engine-room.

Q. I am assuming that the oil from hold 7 came out in the same condition as hold 5.

A. I don't know as to that. I told you I knew nothing about the condition it came out in.

Q. I am asking you to assume that.

A. I am just telling you my opinion of the conditions of stowing cargo, the same sort of cargo in both holds.

Q. I am asking you to assume that it did come out in the same condition, and that hold 7 was ventilated, is it your conclusion that hold 7 would be an improper place to stow it?

(Testimony of John H. Rinder.)

A. No; No. 7 hold is all right for stowing anything of that sort.

Q. What is your conclusion from the fact, which I asked you to assume, that the oil coming from hold 7 was in the same condition as the oil that came from hold 5; will you explain it, please?

A. I do not understand what you want.

Q. We are assuming, for the moment, that the oil from hold 7 came out, the oil in the barrels, in identically the same condition, substantially the same condition as from hold 5. A. Yes.

Q. You say that hold 5 was improper. I tell you that hold 7 had ventilation. Would your conclusion be that hold 7 was also an improper place, notwithstanding the ventilation?

A. I cannot get your point. I do not see what you are driving [48] at.

Q. I will go over it again: The oil from hold 7 came out in the same leaky condition as the oil from hold 5, but hold 7 was ventilated. What would cause the difference?

A. I can't answer that question.

Q. Would your conclusion be that hold 7 was an improper place to stow the oil?

A. No, I should say most likely the barrels were very faulty in the first place, the containers.

Q. Were faulty in the first place?

A. That is the first thing I should go to look for, anyhow.

Q. You have no other conclusion, then, after the facts that I have stated?

(Testimony of John H. Rinder.)

A. That would be the first thing you would look for, and the stowage.

Q. Then your conclusion would be that if the oil came out in the same condition, still that hold 7 would be a proper place, and hold 5 an improper place? A. Absolutely.

Mr. BOLAND.—That is all.

Mr. McKEON.—That is all.

Testimony of G. J. Lehnhardt, for Libelant.

G. J. LEHNHARDT, called for the libelant, sworn.

Mr. McKEON.—Q. Mr. Lehnhardt, you are a master mariner? A. Yes.

Q. How long have you been going to sea?

A. About 15 years.

Q. Did you ever sail in the “Korea Maru”?

A. Yes.

Q. Will you describe the positions you have held on the “Korea Maru”?

A. I was carpenter in her, and then I was fifth mate, fourth mate, third mate, and second mate.

Q. At any time while you were one of the ship’s officers, did you ever have occasion to supervise the stowage of cargo in No. 5 tank? A. Yes. [49]

Q. Do you know No. 5 tank? A. Yes.

Q. Do you know the two pipes that pass up through No. 5 tank? A. The escapes; yes.

Q. What are they? A. Escapes.

Q. Are they ventilators? A. No.

Q. Were they ever intended or constructed as ventilators? A. No.

(Testimony of G. J. Lehnhardt.)

Q. Do you know the hatch, the open hatch above No. 5 tank? A. Yes.

Q. That hatch is not directly over the center of No. 5, is it? A. No, it is not.

Q. Assume, Captain, that that hatch had hatch boards on it and there was cargo stowed on top of the hatch boards, and the doors that opened from these emergency escapes into No. 5 tank were closed, would there be any air getting into that compartment, any cool air? A. No.

Q. Is there any heat in that compartment, from the engine-room?

A. Yes, it comes up through the escapes; it is right over the engine-room, the after part of the engine-room.

Q. Would any hot air, passing through those emergency escapes from the engine-room, heat the steel sides of these escapes?

A. Yes, naturally; the deck would be hot, too.

Q. The deck would be hot as well? A. Yes.

Q. That is a steel deck?

A. That is, the bottom of No. 5 tank? A. Yes.

Q. The master and chief officer of this ship testified that the tanks on the side of this No. 5 tank are cold, fresh-water tanks. Is that the fact?

A. When they leave port they are filled up with water, and when out a while that has condensed water, and that would be hot water—that would be one [50] tank would be hot.

Q. One tank would be hot? A. Yes.

Q. Then you make water after you leave port?

(Testimony of G. J. Lehnhardt.)

A. After we leave port.

Q. Two or three days out? A. Yes.

Q. And during all that time until you get into port, these tanks would have hot water?

A. That one tank would.

Q. One tank? A. Yes.

Q. Where do you keep your cold, fresh water for the supply of the ship?

A. That goes up to a tank, it is pumped up, on the upper deck.

Q. That is located on the upper deck? A. Yes.

Q. From that tank on the upper deck the ship's fresh water supply is taken?

A. It gravitates down.

Q. Through the various pipes throughout the ship? A. Yes.

Q. Mr. Lehnhardt, at any time that you were aboard the "Korea Maru" as ship's officer, or as carpenter, were these doors opening into No. 5 tank ever opened, except when the ship was in port?

A. That is the only time, in port. [51]

Q. Assume that those doors were, as the master and chief officer of the ship testified, open; what sort of air would get into No. 5 tank?

A. The air from the engine-room, hot air.

Q. There would not be any cold air get in there, would there? A. No.

Q. What sort of openings have those escapes on the top deck? A. A mushroom top, a flat top.

Q. Are they constructed for the purpose of taking in air? A. No.

(Testimony of G. J. Lehnhardt.)

Q. What are they commonly referred to as?

A. Escapes.

Q. I am talking about the mushroom tops. Are they out-takes or intakes? A. Out-takes.

Q. By out-takes, you mean for taking air out of the ship? A. Yes.

Q. What is your opinion, Captain, with respect to the question as to whether No. 5 tank is a proper place for the stowage of any cargo that requires ventilation? A. A poor place for it.

Q. A poor place for it? A. Yes.

Q. Could they find a worse place on that ship for the stowage of cargo that required ventilation than No. 5 tank? A. No.

Mr. McKEON.—That is all.

Cross-examination.

Mr. BOLAND.—Q. Where is the refrigerator plant on the “Korea Maru”?

A. Down in the engine-room.

Q. The refrigerating plant is in the engine-room. Where is the cold storage?

A. That is just above the engine-room.

Q. Anywhere near No. 5?

A. Above and forward of No. 5.

Q. So that it comes in contact with it, does it?

A. No, it is above it.

Q. How far above it? A. One deck.

Q. On the next deck, or is there a deck between?

A. One deck above the No. 5.

Q. There is a deck between No. 5 tank and the refrigerating [52] plant, or is it right on the next

(Testimony of G. J. Lehnhardt.)

deck? A. The next deck above.

Q. Does that have any effect on the temperature of No. 5? A. No.

Q. Why not?

A. Because it is all sealed; there is asbestos on the bottom, underneath the deck.

Q. In your judgment, it has no effect, whatever?

A. No.

Q. It has no effect, whatever, upon the temperature? A. No.

Q. How far off is No. 7 hold from No. 5?

A. There is first No. 5, and then No. 6, and then No. 7.

Q. Has No. 7 any ventilation?

A. I believe it has; I am not certain, though.

Q. If it has, is it a better place for the stowage of cocoanut oil than No. 5? A. Yes.

Q. Assume that there is oil stowed in both, and it came out of both in approximately the same condition, how would you explain that?

A. If the oil came out leaking in both her holds?

Q. Yes.

A. The chances are the barrels were in bad order.

Q. In both? A. Yes—in No. 7.

Q. If the barrels came from the same place, were all new barrels, the same shipment, how would you explain it?

A. Maybe some of the hoops were driven up harder than others on the barrel.

Q. Do you think that would be consistently so with the whole shipment in No. 7 as compared to the shipment in No. 5?

(Testimony of G. J. Lehnhardt.)

A. I don't know anything about that.

Q. You don't know anything about this particular shipment, at all? A. No.

Q. Did you ever carry cocoanut oil on board while you were on the "Korea Maru"?

A. I don't know. We carried oil, but I don't know whether it was cocoanut oil or not—I don't know what kind of oil it was. [53]

Q. Where did you stow it while you were on board? A. We carried it in No. 1 and No. 2.

Q. Is there any ventilation in there? A. Yes.

Q. Did you ever have any trouble with it?

A. No.

Q. You don't know whether it was cocoanut oil, or not? A. I do not.

Redirect Examination.

Mr. McKEON.—Q. You never carried any oil in No. 5 tank, did you? A. No.

Q. Captain, something has been said about the cold-storage plant being close to the tank. As a matter of fact, that is on top of the 'tween-decks, isn't it? A. It is one deck up.

Q. One deck above? A. One deck above.

Q. It is not on top of the deck immediately on top of No. 5 tank, is it? A. No.

Q. Do you know in feet the distance between the bottom of the 'tween-decks and the top of the deck below which is No. 5 tank?

A. I think the head room in between the rooms is 7 feet 6, so that would be two decks up, and that would be 14 feet, about.

(Testimony of F. C. Gaster.)

Mr. McKEON.—That is all.

Mr. BOLAND.—That is all.

Testimony of F. C. Gaster, for Libelant.

F. C. GASTER, called for the libelant, sworn.

Mr. McKEON.—Q. Mr. Gaster, do you know the shipment of cocoanut oil that came in on the “Korea Maru” in 1917? A. Yes.

Q. At that time, were you employed as one of the stevedores or hatch-tenders on the “Korea Maru”?

A. I was hatch-tender on No. 5 hatch.

Q. Did that enable you to see into No. 5 tank?

A. Yes, when [54] the hatch doors were off.

Q. Do you remember the condition in which that shipment of Willits & Patterson came in in 1917?

A. I don't know who it was consigned to, but I know it was in very poor condition, leaky barrels.

Q. Did you see these barrels in the tanks?

A. Yes.

Q. What condition were they in?

A. Well, they were very leaky; when they went out in the sling overhead there were a great many empty barrels, and some of them you could see daylight through, and others you could not, and others the oil was running out of them.

Q. How about the hoops on the barrels? Were they loosened?

A. Some of them had a few hoops off, and others there were no hoops on.

Q. Did you go down in that No. 5 tank?

A. Yes.

(Testimony of F. C. Gaster.)

Q. Do you know the two emergency escapes in No. 5 tank? A. Yes.

Q. Are the doors in that escape open? A. No.

Q. Was there any other opening at all into that No. 5 tank? A. Not to my knowledge.

Q. With the hatch boards on that No. 5 tank and cargo stowed on top of the hatch boards, and the doors opening out in the emergency escape closed, would there be any ventilation in that No. 5 tank?

A. Not that I know of.

Q. Is there any possible place for air to get in there, that you ever saw? A. Not that I know of.

Q. In your opinion, is that a proper place for the stowage of cargo that requires ventilation?

A. I should not think so.

Mr. McKEON.—That is all.

Mr. BOLAND.—No questions. [55]

Testimony of James G. Rudden, for Libellant.

JAMES G. RUDDEN, called for the libellant, sworn.

Mr. McKEON.—Q. Mr. Rudden, have you ever sailed on the “Korea Maru”?

A. Yes, I was first officer on her.

Q. For how long?

A. I will say about three years; I don't know the exact time, but I know it is more than three years.

Q. How long have you been going to sea?

A. Twenty-four years.

Q. Mr. Rudden, what is the photograph that I

(Testimony of James G. Rudden.)

have in my hand? A. No. 5 tank.

Mr. McKEON.—This was taken in the presence of the ship's representative, if your Honor please, and I ask that it be marked "Libelant's Exhibit 1."

The COURT.—It will be admitted.

Mr. McKEON.—That photograph shows the starboard emergency escape in the No. 5 tank, or, rather, the escape on the starboard side of No. 5 tank.

Q. Captain, what is that photograph that I have in my hand? A. That is No. 5 tank.

Q. What is that steel upright?

A. An escape, an uptake.

Q. An escape, an uptake? A. Yes.

Q. Is the door facing the officer there the door that has been referred to in this matter?

A. Yes.

Q. That is the door that was testified to as having been opened to ventilate this cargo? What are these cross bars?

A. They are cargo battens; cargo is stowed up against that to prevent cargo from getting onto this bulkhead, which is hot, in order to pass a circulation of air through if there is anything down there.

Q. What is that steel bulkhead the other side of the cargo battens?

A. That is a steel bulkhead between No. 5 tank and the engine-room. [56]

Q. Is the engine-room just forward of it?

A. Yes, just forward of it.

(Testimony of James G. Rudden.)

Q. This photograph, if your Honor please, shows the escape on the left-hand side of this tank. Is that right? A. Yes.

Q. This one shows the right-hand side?

A. Yes.

Mr. McKEON.—I ask that that be marked “Libelant’s Exhibit No. 2.”

The COURT.—It will be admitted.

Mr. McKEON.—Q. I show you another photograph of the “Korea Maru,” Captain, and ask you to identify the objects that appear there in the foreground, and on the right-hand side facing it?

A. This is a continuation of these square tanks, the uptake and the escape.

Q. This top that you see there that has been referred to here as the mushroom top?

A. That is the mushroom top.

Q. These are the places where both of the emergency escapes open on to the top of the tank?

A. On to the top of the tank.

Q. I will mark that “A” and the other top to the emergency escape “B,” and the mushroom top “C.” Captain, what is that which I am pointing to, which I will mark “D”?

A. That is the ventilator leading to the port engine-room, and to the working platform.

Q. The ventilator permitting air to go to the engine-room?

A. To the engine-room, and it is trimmed according to whichever way the wind is.

Q. What does the mushroom top do?

(Testimony of James G. Rudden.)

A. It allows the hot air or foul air, if there is any down there, to escape.

Q. To go out? A. It is not a ventilator.

Q. It is not a ventilator? A. No.

Mr. McKEON.—I ask that that be marked “Libelant’s Exhibit 3.” [57]

Q. I show you another photograph, Captain, of the top of one of the emergency escapes and the top deck with the mushroom top. Can you identify it? A. Yes, there is one on each side.

Mr. McKEON.—I ask that that be marked “Libelant’s Exhibit 4.”

Q. Captain, is there any opening into that No. 5 tank other than the doors in the emergency escapes and the cargo hatch above?

A. There is not. This is all ceiled up with woods on both sides of the tank.

Q. On both sides of the fresh-water tanks?

A. On both sides of the fresh-water tanks, yes.

Q. Referring to Libelant’s Exhibit 2, showing the door that opens into No. 5 tank, is that door ever opened while the ship is at sea?

A. No, it was only opened at Hong Kong when we wanted to get into the fresh-water tanks to clean them out.

Q. What is the emergency escape constructed for?

A. If anything happens in the engine-room, it is constructed that they can come up through that escape and go out on the main deck, the deck above there.

Q. Is it ever used as a ventilator? A. No.

(Testimony of James G. Rudden.)

Q. Was it ever intended as a ventilator?

A. No.

Q. Captain, what have you to say with respect to the tanks that adjoin these fresh-water tanks, that adjoin the No. 5 tank, as to whether they contain hot water?

A. The fresh-water tanks, when we are leaving Yokohama, four of them are all filled with cold water, and on the third day out we start to evaporate water and fill it in one of these tanks; the first tank that is empty, we start to evaporate and put it into these tanks, and then it is pumped onto the bridge to a hot well to cool off and then it goes through the different levels [58] of the ship, goes to the baths, to the galley, the forecastle, etc.

Q. Has the engine-room any effect upon No. 5 tank with respect to heat? A. It certainly has.

Q. If this door appearing on the emergency escape of No. 5 of exhibit 2 were closed, Captain, would the hot air passing through it have any effect on the steel emergency escape?

A. On the four sides of it; yes.

Q. What effect would it have?

A. It would heat it.

Q. If that door appearing in Libellant's Exhibit 2 were open, Captain, on the voyage from Manila to San Francisco, as testified to by the master and first officer of this ship, what sort of air would enter No. 5 tank from those doors.

A. You would have excessive heat.

Q. What sort of air would get in there?

(Testimony of James G. Rudden.)

A. Excessive heat.

Q. What sort of air would get in there?

A. Hot air.

Q. Captain, assume that the hatch boards were down on No. 5 tank, and on top of those hatch boards cargo was stowed to the ceiling of the next deck above, the 'tween-deck, and assume that the doors in both emergency escapes were closed, would there be any ventilation in No. 5 tank?

A. None whatsoever.

Q. Would the heat of the engine-room on the floor of that No. 5 tank have any effect upon heating No. 5 tank? A. Yes.

Q. Then that tank is practically surrounded by heat?

A. It is completely surrounded by heat, except on the ship's sides.

Q. And except above? A. And except above.

Q. Have you recently tried to open those doors, Captain? A. Yes.

Q. How did they move?

A. Pretty hard to work; even this morning I tried them. [59]

Q. Do you remember trying to open them in the presence of Mr. Boland and Mr. Chapin?

A. Yes, we had to get a sharp instrument to pry them open.

Q. Do you remember going down to that vessel, the "Korea Maru," in company with Mr. Boland, Mr. Chapin, and myself? A. Yes.

Q. The ship was light then, was she not?

(Testimony of James G. Rudden.)

A. Yes.

Q. The cargo hatches were off, too, were they not? A. Yes.

Q. There was not any cargo in No. 5 tank?

A. No.

Q. The ship was not working cargo, then, either, was she? A. No.

Q. Do you remember standing off some distance in the center, from the engine-room bulkhead, and about ten feet forward of the engine-room bulkhead, and holding up your hand? A. Yes.

Q. Did you notice any heat from that engine-room bulkhead there? A. I did.

Q. Do you remember in the presence of these gentlemen asking the officer of that ship whether that door was ever open at sea? A. Yes.

Q. Do you remember the answer that he made?

A. In the negative.

Q. He said it was never open at sea?

A. Never open at sea.

Q. I speak of the door opening into the No. 5 tank from the emergency escape. Here is a blue-print, if your Honor please, of the "Korea Maru" and the "Siberia"; they are sister ships; they were owned by the Pacific Mail and sold to the T. K. K. Line, containing a cargo plan and the location of the engine-room, bunker space, etc., introduced on the deposition of the master. I don't know whether Mr. Boland is going to introduce his deposition.

Mr. BOLAND.—I presume so.

Mr. McKEON.—I do not want to introduce it, but

(Testimony of James G. Rudden.)

I want to [60] refer to this blue-print.

Mr. BOLAND.—You had better introduce it, then.

Mr. McKEON.—I am perfectly willing to have it go in, although I do not introduce it.

Q. Captain—

Mr. BOLAND.—I do not see how you can refer to it, unless you want to put it in.

Mr. McKEON.—Q. Captain, do you identify that as a blue-print of the “Korea Maru”? A. Yes.

Q. Pointing to No. 5 orlop, is that the place which has been referred to as No. 5 tank?

A. Yes.

Q. The engine-room is marked on this particular compartment, is it not? A. Yes.

Q. The cold-storage compartment that has been referred to by the witness who preceded you is not on top of the tank No. 5, is it?

A. No, it is not; there is a deck between.

Q. No. 7 orlop-deck, that has been referred to, is marked on that blue-print, is it? A. Yes.

Mr. McKEON.—I ask that that be marked “Libelant’s Exhibit 5.”

The COURT.—It will be admitted.

Mr. McKEON.—Captain, it has been referred to that there is a wooden bulkhead between the No. 5 tank and the steel bulkhead separating the engine-room from No. 5 tank.

A. No, there is no bulkhead there.

Q. It is a cargo batten?

A. It is a cargo batten.

(Testimony of James G. Rudden.)

Q. Just as that photograph shows? A. Yes.

Q. There has been no change in these man escapes since you have been on that ship? A. No.

Q. Those escapes do not run into the shaft alley, do they? A. No.

Q. Captain, is it possible to see oil pumped overboard in the [61] wake of the ship?

A. Well, it is possible, but with that ship, at the speed she moves—she moves along pretty quick, 15 knots, it is not. It is possible if she was going along slow.

Q. Captain, did you sound any of your bilges?

A. Yes.

Q. Did you use a rod? A. We used a rod, yes.

Q. Where do you usually sound your bilges?

A. There are various parts of the ship.

Q. Is there any place to sound the bilges in that ship? A. Yes.

Q. In the engine-room? A. Yes.

Q. When you sound your bilges you drop your rod, pick it up, and look at it?

A. Yes; the rod is graduated to inches, to see how much water is in the bilge.

Q. You always look at your rod? A. Yes.

Q. If there is any oil in the bilges you can see it?

A. Yes, it would be right on the rod, and would show it.

Q. Suppose, Captain, that cocoanut oil escaped from the barrels of No. 5 tank and passed out through the scuppers of No. 5 tank and on into the bilge, if soundings were taken of those bilges, would

(Testimony of James G. Rudden.)

not the person taking the sounding of those bilges have been advised of the fact that there was oil in those bilges?

A. Certainly; it would show on the rod.

The COURT.—It would show on the rod?

A. It would show on the rod, yes.

Mr. McKEON.—Q. Captain, outside of your sea experience, have you ever been in charge of the stevedoring of any particular companies in San Francisco?

A. Yes; when I was with the Pacific Mail I had charge of loading the “Korea” and discharging the “Korea.”

Q. In your opinion, is that No. 5 tank a fit place to carry any cargo that requires ventilation?

A. No, it is not a fit place. [62]

Q. Is it suitable for the carriage of cocoanut oil?

A. I should say not.

Q. Captain, you recall the experience, about which you have testified a short while ago, of going down to that ship, and in the presence of these gentlemen and myself, holding your hand up to the middle of the room, or the tank, and getting heat from the steel bulkhead of the engine-room?

A. Yes.

Q. At that time the ship was not discharging cargo; and she was light, and the air was coming in through the hatches; she was not completely covered over. In comparing the heat from the engine-room at that time to when the main engine is working when the ship is at sea, what would you

(Testimony of James G. Rudden.)

say as to the comparison of the heat from the engine-room?

A. It would be more than double that heat.

Q. When the ship is at sea? A. Yes.

Mr. McKEON.—I think that is all at this time.

Cross-examination.

Mr. BOLAND.—Q. Captain, how long is it since you ceased going on the high seas?

A. Two years.

Q. You have been on shore two years?

A. I have been on shore about three years—it is not quite three years.

Q. What was your last position?

A. My last position was stevedore for the San Francisco Stevedore Company—head stevedore.

Q. Head stevedore? A. Yes.

Q. In San Francisco? A. Yes.

Q. What are you doing now?

A. I am with Captain Rinder, marine surveyor—stationed with Captain Rinder; he is a marine surveyor.

Q. Employed by him?

A. Employed by the Pacific Mail Steamship Company. [63]

Q. You are employed by the Pacific Mail?

A. Yes.

Q. Regularly? A. Monthly.

Q. How long is it since you were on the “Korea Maru”? A. I cannot recall the year.

Mr. McKEON.—You mean the time when he visited her, or when he sailed on her?

(Testimony of James G. Rudden.)

Mr. BOLAND.—When he was employed on her.

A. I cannot tell you the exact year.

Q. Approximately; four or five years back?

A. It is worse than that; say seven years ago.

Q. How long were you on her sailing out of here?

A. I sailed on her over three years.

Q. What were your various positions?

A. Chief officer, all the time.

Q. Did you get into the engine-room quite often?

A. Quite often.

Q. When you speak of the engine-room, you are not speaking of the stoke hold? A. No.

Q. The engine-room proper? A. Yes.

Q. What portion of the engine-room is that which is immediately adjoining the No. 5 tank?

A. There are refrigerating engines there.

Q. The refrigerating engines? A. Yes.

Q. Where is the main engine?

A. The main engine is directly forward of this tank, of this No. 5 bulkhead.

Q. How far in feet, Captain?

A. I should judge not more than two or three; it is perpendicular to the bulkhead.

Q. They are below, are they?

A. The thrust recess is below that tank and just forward of the forward bulkhead is the engine.

Q. Not more than two feet?

A. That is all. [64]

Q. How far are the refrigerating engines?

A. They were in the wing, away up in the ship's side.

(Testimony of James G. Rudden.)

Q. Tell me what is the difference between the temperature of the engine-room and the outside atmosphere, ordinarily?

A. The temperature of the engine-room, in my time there, would run as high as 120.

Q. Would run as high as 120 in the engine-room?

A. Yes, 110 or 120.

Q. That would vary, would it, with the temperature outside? A. It would; yes.

Q. If the temperature outside were, say, 90, which is a reasonable temperature for Manila, is it not?

A. About that.

Q. And 90 being a reasonable temperature for Manila, what would be the relative temperature of the engine-room?

A. In Manila, 120 to 130, if she was stopped, but while she is in motion, there is a circulation of air.

Q. It would be a little cooler in motion?

A. Yes, but generally the engineers on watch stand at the ventilators most of the time.

Q. If the temperature went down to 80 outside, the temperature in the engine-room would go about 100, would it, relatively?

A. It would go more than that—it will stay there a long time.

Q. 100 to 105, approximately. Is that right?

A. About that. It is hotter when she is in port, you know.

Q. It is hotter when she is in port than when she is moving; that tends to cool the ship?

A. That does not tend to cool it all, just one

(Testimony of James G. Rudden.)

particular part where the engineer is on watch.

Q. It tends to cool the engine-room?

A. Just one portion where the engineer is on watch.

Q. Doesn't it create circulation from the thrust recess and [65] shaft alley?

A. It creates a circulation which draws all the heat away through these escapes.

Q. Isn't it rather cool in the shaft alley and thrust recess? A. No, it is not.

Q. What is the ordinary temperature there in regard to the engine-room, as warm, or warmer?

A. No, it is about the same.

Q. The temperature, you say, is hotter or about the same? A. About the same.

(An adjournment was here taken until to-morrow, March 26, 1919, at ten A. M.) [66]

Wednesday, March 26, 1919.

JAMES G. RUDDEN, cross-examination (resumed).

Mr. BOLAND.—Q. Mr. Rudden, in your answer on direct examination to the effect that tank 5 was an improper place to stow cocoanut oil, you were assuming, I suppose, that some cocoanut oil had been stowed in that and had leaked?

A. I did not see the oil in there.

Q. You stated it was an improper place to stow cocoanut oil; in your answer you assumed that some had been stowed in there and had leaked. Isn't that a fact? A. Yes.

(Testimony of James G. Rudden.)

Q. You had been told that was a fact?

A. Yes.

Q. Now, do you know hold 7 in the same vessel?

A. Yes.

Q. That is aft of tank 5?

A. No, it is abaft of 6.

Q. 6 is between 5 and 7? A. Yes.

Q. Will you now assume that there was substantially the same amount of leakage in certain of the same cargo of oil in hold 7 as in hold 5. How do you account for that?

A. There are many ways you can account for it.

Q. Will you do so?

A. In the first place, it may be through bad handling in hoisting or striking the hatch coamings, or bad stowage in the hold, or there might be a pressure of cargo on top of those barrels, if there was any cargo in there; I don't know whether the hold was full of oil or not, but if it was not, having heavy cargo on top.

Q. Would the question of heat have anything to do with it? A. Not in that hold; no.

Q. That is, any oil stowed in hold 7 would not leak by reason of heat?

A. There is always more or less leakage.

Q. There is always a certain amount of leakage in cocoanut [67] oil? A. Yes.

Q. This oil goes on board in a liquid state?

A. Liquid state.

Q. In Manila? A. In Manila.

Q. And it remains liquid part of the voyage?

(Testimony of James G. Rudden.)

A. Part of the voyage.

Q. In any event? A. In any event, yes.

Q. Assume, Mr. Rudden, that the temperature when on board at Manila was in the neighborhood of 90 degrees Fahrenheit, and that it remained between 80 and 90 for the greater portion of the voyage, would that oil solidify?

A. I don't know. I am not a chemist.

Q. You don't know? A. No.

Q. What is the liquefying point of cocoanut oil?

A. I could not tell you that; I don't know.

Q. You don't know the liquefying point?

A. No.

Q. Nor do you know the solidifying point?

A. I have only heard of it.

Q. You don't know anything about it?

A. No. I have heard it was 60, but I don't know for sure.

Q. You have heard it was 60?

A. It gets solid at 60.

Q. Where did you hear that?

A. Around the water front.

Q. Do you know anything about the effect of oil on spruce, pine barrels?

A. Nothing more than it will penetrate in to a certain extent.

Q. Penetrate to a certain extent?

A. Not through—it will not go through.

Q. You think it will not penetrate through?

A. No, I do not think so.

Q. You think, then, assuming that the barrel is

(Testimony of James G. Rudden.)

made of pine and is tight when the oil is put in liquid, and that it remains [68] liquid for the greater part of the voyage from Manila to San Francisco, that there would be no seepage through the barrels unless there was an excess heat?

A. Unless as to the points I have already told you, a careless handling or bad stowage.

Mr. McKEON.—And heat?

A. And heat, yes.

Mr. BOLAND.—I said excepting heat. Will you explain why it is that heat causes leakage?

A. Oil expands.

Q. Oil expands under heat?

A. Yes, and dries up the barrels, warps the barrels.

Q. Let us get at one point at a time: Oil expands under heat? A. Yes.

Q. How much heat causes it to expand?

A. I could not answer that question.

Q. If it liquefies at 60, what would be its relative expansion at 70? A. No, it is solid at 60.

Q. If it solidifies at 60, what is its liquefying point—the same figure, is it not? A. 60.

Q. It will start to liquefy at 60 if it is solid at 60, would it not?

A. Yes, but it would not be a total liquid.

Q. At what figure would it be a total liquid?

A. I suppose, in my estimation, about 80 or 90.

Q. 80 or 90? A. Yes.

Q. Then assume that it is a total liquid at 90, what is the rate of expansion per degree of heat

(Testimony of James G. Rudden.)

after that? A. That is too much for me.

Q. You don't know? A. No.

Q. Then your assumption, to that extent, is based upon what, that the oil expands under heat?

A. Any kind of oil will expand under heat.

Q. But you don't know what degree of heat will cause it to expand? A. No. [69]

Q. You then stated as a second part of your answer that it would cause the barrels to shrink. Why will it cause the barrels to shrink?

A. I said excessive heat would cause the barrels to shrink.

Q. These barrels that we are dealing with to-day were made of spruce—

Mr. McKEON.—California fir.

Mr. BOLAND.—California fir, pine; you must assume that they are dry before the oil is put in them.

A. Naturally they would be, or the oil would leak out, if they were not.

Q. Assume they were dry when the oil was put in them, how much additional heat is required to make them shrink some more?

A. I can't answer that.

Q. You don't know? A. No.

Q. Is it not a fact that they have been shrunk all it is possible to shrink them before the oil is put in? A. I don't know that.

Q. Wouldn't they be defective containers—wouldn't they be defective if they were not shrunk to the fullest extent when the oil was put in?

(Testimony of James G. Rudden.)

A. They must be perfect, or else the oil would leak out.

Q. In other words, when the oil is put in they are shrunk to their fullest extent, or else they are defective? A. I would not say defective.

Q. What are they if they are not shrunk to the fullest extent? A. I don't know.

Q. Your conclusion is if they are not shrunk to the fullest extent they are defective?

A. No, I would not use the word "defective," because that would be remedied by cooperage.

Q. Wouldn't it be necessary to continually remedy them by [70] cooperage if they are not shrunk to the fullest extent? Wouldn't they have to be continually tightened?

A. No, they could tighten them after the oil is in them, if they started to leak.

Q. Then if they started to leak they could be tightened by coopers? A. By coopers.

Q. If they are not thoroughly dry, wouldn't there still be shrinkage?

A. They thoroughly dry out in Manila.

Q. Isn't Manila a damp climate?

A. No—around the swamps it is.

Q. Isn't Manila damp climate? A. No.

Q. Is it a dry climate?

A. It is hot, good and warm.

Q. Isn't it a damp climate, a humid climate?

A. No, I never found it so.

Q. In July and August, isn't it a humid climate?

A. I never found it so.

(Testimony of James G. Rudden.)

Q. Now, assuming that these barrels are thoroughly dry when the oil is put in, how is it possible for there to be further shrinkage?

A. From excessive heat.

Q. What degree of heat will cause them to further shrink? A. I can't tell you that.

Q. Would 90 degrees? A. No, 90 would not.

Q. 90 would not? A. No.

Q. Would 95? A. No.

Q. Would 100? A. Over 100.

Q. You think over 100 would cause them to shrink some more? A. Yes.

Q. Do you know how these barrels are dried? Are they kiln-dried?

A. I never have seen any of them; I have not seen the barrels, and I could not say whether they are kiln-dried or not. I suppose they are. [71]

Q. You think anything over 100 would cause them to shrink some more?

A. If the temperature stays at that one stage all the time it would not, but the temperature in No. 5 hold of this vessel runs to 120 and as high as 130.

Q. In hold 5? A. In hold 5.

Q. That is in the same ratio as the temperature will vary in the engine-room? A. Yes.

Mr. McKEON.—Q. Will that hold be hotter than the engine-room at any time?

A. Yes, because the heat is retained there.

Mr. BOLAND.—What is the relative difference in heat between hold 5 and hold 7, Mr. Rudden?

A. No. 7 has ventilation, and part of this hold the ship's side is in the water, whereas No. 5 is not.

(Testimony of James G. Rudden.)

Q. That is plain, but you have not answered the question: What is the difference in the relative heat between holds 5 and 7?

Mr. McKEON.—You mean in degrees?

Mr. BOLAND.—Yes, relatively.

A. I would figure No. 7 hold would go about 65 at either side, in heat—65 to 70.

Q. It would ordinarily be 65 or 70? A. Yes.

Q. Assume that the outside air is from 80 to 90, what will the temperature of hold 7 be?

A. There is a circulation of air providing the vessel is moving.

Q. You think that the temperature in hold 7 would be less than the outside air by 15 degrees?

A. Yes—I don't know about 15 degrees; say 10 anyway.

Mr. McKEON.—It is below the water line.

A. It is below the water line, the water has an effect on it.

Mr. BOLAND.—That is all. [72]

Redirect Examination.

Mr. McKEON.—Q. Do you know whether or not barrels always have some moisture in them?

A. No, I could not say.

Q. You don't know? A. No.

Q. Basing your answer on your experience, do you know whether heat affects barrels?

A. Heat does affect barrels.

Q. The heat that was in No. 5 tank, would that have any effect upon any sort of a wooden barrel?

A. It would, even an oak barrel.

Testimony of Cecil Brown, for Libelant.

CECIL BROWN, called for the libelant, sworn.

Mr. McKEON.—Q. Captain, are you a master mariner? A. Yes.

Q. How long have you been following the sea?

A. Twenty years.

Q. Have you also been connected with the office of inspector of hulls and boilers?

A. Yes, for ten years.

Q. What is your present occupation?

A. I am marine surveyor for the San Francisco Board of Marine Underwriters.

Q. The Board of Marine Underwriters have not anything to do with this case, have they?

A. No.

Q. As inspector of hulls and boilers, have you ever had occasion or opportunity to inspect the "Korea Maru"?

A. Yes, she was inspected annually.

Q. Recently, have you had occasion to again inspect and go through tank No. 5 of the "Korea Maru"? A. Yes, I have seen that compartment.

Q. Have you had occasion to inspect the two pipes that pass through tank 5? A. Yes.

Q. What are they called?

A. They are called uptakes, and used in the capacity of an emergency exit.

Q. An emergency exit from where?

A. From the engine-room. [73]

Q. Referring to Libelant's Exhibit No. 2, is that one of the emergency escapes?

(Testimony of Cecil Brown.)

A. Yes, that is one of them.

Q. Passing through tank 5?

A. Yes, one on each side.

Q. Is that the other one, referring to Libelant's Exhibit 1, on the opposite side of the tank?

A. Yes, that is the other one.

Q. Do you see a door, Captain, on the photograph marked Libelant's Exhibit 2?

A. Yes, there is a door in there.

Q. A door opening into the emergency escape?

A. Yes.

Q. That door appears to be closed, doesn't it, Captain? A. Yes, it does.

Q. Captain, assume that the hatch boards are on No. 5 tank and the steel door opening into the tank from the emergency escapes is closed and bolted, and cargo is stowed on top of the hatch boards to a height of 7 feet, is there any possible chance for air to get into that compartment?

A. Absolutely none; it then becomes air-tight.

Q. That door appears as though it was sealed.

A. Yes, I have never seen it open, either.

Q. You referred to uptakes, that these emergency escapes are also used as uptakes—uptakes of what?

A. An uptake is used for taking up the hot air after it has been ventilated by cold air with a ventilator.

Q. Captain, assume that the hot air was passing up through the uptake of the emergency escape, would that hot air have a tendency to heat these steel sides? A. Yes.

(Testimony of Cecil Brown.)

Q. And that heat would get into tank 5?

A. Yes.

Q. Referring to Libelant's Exhibit 3, what are those two objects marked "A" and "B"?

A. They are uptakes.

Q. Are they the top of the uptakes that pass through No. 5? A. Yes.

Q. What is that marked "C" on the same exhibit? [74] A. That is a mushroom top.

Q. On the top of these escapes?

A. On the top of these emergency escapes, and uptakes.

Q. What is that referred to as "D"?

A. That is a ventilator.

Q. On the same exhibit? A. Yes.

Q. What is the difference between a ventilator and a mushroom top?

A. A mushroom top on an uptake is permanent; it drops down over the uptake to prevent any water, rain water or sea water, from getting in; a ventilator is a cylinder in which the cowl is turned in the direction of the wind for ventilation.

Q. That is swung about?

A. That is swung about in the direction of the wind.

Q. What is the purpose of that?

A. To ventilate the interior of the ship.

Q. To take air in? A. To take air in.

Q. Referring to Libelant's Exhibit 4, Captain, is that another picture of the mushroom top of the emergency escape? A. Yes.

(Testimony of Cecil Brown.)

Q. Captain, assume that that No. 5 tank is completely enclosed, that is, the door leading from the emergency escape is closed, the only opening into it being covered with hatch boards and on top of the hatch boards cargo stowed to a height of 7 feet above, would that compartment in that condition be a suitable place for the stowage of any cargo that required ventilation? A. No.

Q. Assume the same state of facts, and the doors leading from the man escape into No. 5 tank open, what sort of air would get into No. 5 tank from those doors, cold air or hot air? A. Hot air.

Q. With that condition prevailing, would that be a suitable or proper place for the stowage of any kind of cargo that required ventilation?

A. No, sir. [75]

Mr. McKEON.—That is all.

Cross-examination.

Mr. BOLAND.—Q. How many years were you on ship's board? A. Twenty years.

Q. In what capacity?

A. Right up the ladder, to master.

Q. From what?

A. From a boy to master.

Q. On what vessels?

A. Both sail and steam.

Q. Why did you stop going to sea?

A. I stopped ten years ago, but I have been to sea since in the Navy; I am just ashore two months from the war.

Q. You were in the Navy? A. Yes.

(Testimony of Cecil Brown.)

Q. During the war? A. Yes.

Q. But you have been ashore for ten years?

A. I was in the United States Steamboat Inspection service.

Q. While you were in the Navy?

A. No, prior to that, while stopping ashore.

Q. What was your last command, Captain?

A. The "Major Wheeler."

Q. What tonnage? A. 5,500.

Q. Where did she sail to?

A. From here to the West Coast, and the West Coast to the East Coast.

Q. Not in the Oriental trade? A. No.

Q. Did you ever carry any cocoanut oil on board?

A. No.

Q. Did you ever carry cocoanut oil on any of your commands? A. No.

Q. Do you know anything about cocoanut oil at all? A. That is, its peculiarities, you mean?

Q. Yes. A. No.

Q. These emergency exits that you were speaking of, they are for the purpose of letting the engineers get out on deck?

A. They are demanded by the United States Government laws, [76] that they shall have an emergency escape from the engine-room in case of disaster or collision at sea; there is a ladder that runs inside of those.

Q. Where do they go out, where is the exit?

A. It goes up on the inside and comes out on the

(Testimony of Cecil Brown.)

main deck, but continues up to the promenade deck, as these exhibits show.

Q. I think you said that hold 5 would not be a place for cargo requiring ventilation? A. Yes.

Q. Do you know anything about hold 7 on the same vessel?

A. Yes, I have been more or less acquainted with the whole ship.

Q. Would hold 7 be a suitable place, do you think, for cargo requiring ventilation?

A. Yes, because it has ventilators in there leading through.

Q. What would be the difference in degrees of temperature between holds 5 and 7, in your judgment?

A. Between 5 and 7?

Q. Yes.

A. In that compartment, right in the engine-room, there, there is about 112 or 115 degrees of heat, while that vessel is under way, against about 70 or 75 in the other end of the ship, No. 7.

Q. You think that is due entirely to the presence of the engine-room?

A. That is on account of the confinement of the hot air in that particular locality of the engine-room.

Q. Assume, Captain, that the cargo coming out of hold 7 is in the same condition as the cargo coming out of hold 5 in this particular instance, how would you account for it?

A. Well, do I understand your question to be that

(Testimony of Cecil Brown.)

they are practically in the same condition?

Mr. BOLAND.—Yes.

Mr. McKEON.—With reference to what, stowage?

Mr. BOLAND.—Q. Assume that the stowage is the same in both instances, Captain—proper stowage. [77]

Mr. McKEON.—If your Honor please, I interpose an objection to that on the ground that the testimony already taken in the case shows that the stowage was not the same in the two compartments; that is the testimony on behalf of the ship itself.

The COURT.—He has a right to test the witness as an expert; if there is any dispute about whether the condition was the same or not, I cannot tell prior to hearing that other testimony, so I will overrule the objection.

Mr. McKEON.—The testimony is already in in the depositions, and there is no dispute on it at all, that the barrels in No. 7 were stowed entirely different from the barrels in No. 5.

The COURT.—I understood from counsel's questions, possibly not from any direct statement of his, that it is going to be his position that there was as much leakage in No. 7 as there was in 5. That is what I gathered.

Mr. BOLAND.—Yes.

The COURT.—If he expects that to be shown by any part of the testimony, the question is pertinent, so I will overrule the objection.

(Testimony of Cecil Brown.)

Mr. BOLAND.—I will withdraw the question and reframe it.

Q. Assume, Captain, that while the stowage was not actually identically the same, that the stowage in both instances was good in holds 5 and 7, and that the cargo came out in the same condition, how would you account for it?

Mr. McKEON.—I object to that on the ground that it does not state the conditions. Let the captain pass upon whether the stowage is good.

The COURT.—If the captain feels he can express a safe opinion on that question he can do so. The objection will [78] be overruled.

A. Well, I would like to ask if it came out in the same condition.

Mr. BOLAND.—Yes, I am assuming that in the question.

A. Well, that is a matter of stowage and a matter of handling.

Q. I am assuming, Captain, that the stowage was sufficient in both instances.

A. That is, you are assuming the stowage was absolutely correct?

Q. In both instances?

A. And you are assuming that the handling of the barrels was the same?

Q. Was the same.

A. And that these barrels actually came out in the same condition?

Q. In the same condition—how would you account for it? A. I can't see how they could.

(Testimony of Cecil Brown.)

Mr. McKEON.—That is, you don't see how they could come out in 7 the same way? A. No.

Mr. BOLAND.—That is all.

Redirect Examination.

Mr. McKEON.—Q. Damage to cargo is dependent, in a large measure, upon proper stowage, is it not? A. Absolutely.

Q. No. 5 tank is right alongside of the engine-room, isn't it? A. Yes.

Q. The steel bulkhead appearing in Libelant's Exhibit No. 2 and the cargo battens there are the only things that separate the engine-room from the cargo compartment? A. That is all.

Testimony of W. E. Boyer, for Libelant.

W. E. BOYER, called for the libelant, sworn.

Mr. McKEON.—Q. What is your business?

A. Exporting and importing, with Willits & Patterson.

Q. Willits & Patterson owned this consignment of oil under discusison here? A. Yes. [79]

Q. And referred to in the libel? A. Yes.

Q. Were you present at the time the "Korea Maru" came into this port with your cocoanut oil on board, or at the time it was being discharged?

A. I was.

Q. Do you remember the condition in which the cargo came out of No. 5 tank? A. I do.

Q. Will you describe it?

A. It was in very bad condition.

(Testimony of W. E. Boyer.)

Q. What condition were the barrels in?

A. Leaking very badly.

Q. What physical condition were the barrels in?

A. The hoops were off of some of them, a good many of the hoops, and the staves broken in.

Q. What effect did it have on the barrels outside of the staves being broken in and hoops off? Did it cause the barrels to shrink, or did it not?

Mr. BOLAND.—I object to the question as calling for the conclusion of the witness, without a proper foundation being laid.

Mr. McKEON.—It is a matter any man can see.

The COURT.—The objection is sustained until you qualify him in some way, as to what his experience is with barrels.

A. The barrels were leaking very badly when they came out—

Mr. BOLAND.—Just a minute. There is an objection sustained to that question.

Mr. McKEON.—There is a question before the witness.

Mr. BOLAND.—I objected to the question, and the Court sustained it.

The COURT.—I sustained the objection to the question, and I have ruled that you may qualify him further as to whether he knew anything about barrels shrinking or not.

Mr. McKEON.—Q. Did you see the barrels that came out of No. 7, Mr. Boyer? A. I did. [80]

Q. What condition were they in?

A. They were in good condition.

(Testimony of W. E. Boyer.)

Cross-examination.

Mr. BOLAND.—Q. What time did you get to the dock, Mr. Boyer?

A. When they started unloading.

Q. As soon as they started unloading?

A. Yes.

Q. And remained all the time during the unloading, did you?

A. No, I would go back and forth from the office; I was there a good deal of the time while they were unloading.

Mr. McKEON.—Have you produced the letter that I have demanded?

Mr. BOLAND.—I have not got it.

Mr. McKEON.—Then I offer in evidence a copy of a letter signed by the master of the ship, the “Korea Maru,” to Mr. T. Vaido, the agent for the Toyo Kisen Kaisha at Hong Kong. I have demanded the original of it.

Mr. BOLAND.—There is no question about the oral demand.

Mr. McKEON.—I will offer in evidence the deposition of George C. Arnold, taken on behalf of the libelant, and I assume it will be deemed read at this time.

The COURT.—Admitted.

Mr. McKEON.—It was taken on regular notice.

I offer in evidence a stipulation to the effect that it is agreed to between the respective parties to this action that the cocoanut oil which is the subject matter of the above-entitled suit, at the time

of shipment and delivery to the above-named vessel was in good order and merchantable condition, and was in liquid form.

The COURT.—Admitted.

Mr. McKEON.—I also offer in evidence a stipulation between the parties to this effect: “It is hereby stipulated and [81] agreed that upon the trial of the above-entitled action it may be deemed that the following-named witnesses have testified in the words following each of their names herein.

“It is further stipulated that for the purpose of the trial of said action the following statement of each of said witnesses shall be deemed to be his testimony:

“J. CARRERO:

“I am the senior partner of the firm of Carrero, Vidal & Co., of the City of Manila, P. I., engaged in the manufacture of cocoanut oil; that on or about the 7th day of July, 1917, said firm, for and on behalf of Willits and Patterson, loaded on board the Japanese Steamship ‘Korea Maru,’ at the City of Manila, a consignment of cocoanut oil in barrels; that said barrels when loaded and stowed on said steamship ‘Korea Maru’ were sound, tight and in good condition, and showed no leakage.

E. ALCANTARA:

“I am a custom-house broker of the City of Manila; that on or about the 7th day of July, 1917, I saw and inspected a shipment of oil in barrels in a warehouse at the port of Manila, and on board the Steamship ‘Korea Maru’; that said barrels

containing said cocoanut oil were at all times to and including the stowage thereon on said steamship, sound, tight and in good condition, and showed no leakage.

A. REYES:

“I saw the shipment of cocoanut oil on board the Japanese Steamship ‘Korea Maru’ on or about July 7, 1917. The barrels in which the cocoanut oil was loaded were sound, tight and in good condition and showed no leakage.”

HERBERT HENRY.

“This man is the only one who is an employee of Willits & Patterson. [82]

“I am an employee of the Manila Office of Willits and Patterson; that on or about the 7th day of July, 1917, I saw the barrels of cocoanut oil loaded on board the Japanese Steamship ‘Korea Maru’ at the city of Manila; that when loaded said barrels were sound, tight and in good condition, and showed no leakage.”

If your Honor please, these people are all on the other side, and to save time and expense we agreed that that testimony is to be deemed their testimony.

Mr. BOLAND.—I might say in reference to the original of that letter that counsel has shown me a copy of, I know nothing about it, but I understood from somebody that such a letter had been written, and I am assuming that that is a copy of it, of which I also know nothing.

The COURT.—It will be admitted.

Mr. McKEON.—I ask that it be admitted and marked.

That is our case, if your Honor please. I may say it has been agreed that as to the damages, if liability be determined, that will take the usual course of reference; it will be a very simple matter. The quantity shipped is admitted in the answer, and the public weighers here have weighed the oil when it came in, and it is just the difference, and the question would be the value of that. We will have no difficulty on that.

Mr. BOLAND.—I think there is no necessity for making an opening statement, as I think your Honor has gathered from my cross-examination the nature of our defense. I will first offer the three bills of lading under which this cargo was shipped, and ask that they be marked “Respondents’ ‘A,’ ‘B’ and ‘C.’ ”

The COURT.—Admitted.

Mr. BOLAND.—We will now offer the depositions that were taken on behalf of the claimant, being those of Hugh Kondo, [83] T. Ota, Y. Iijima, and Y. Yamamura, and they may be considered as read.

The COURT.—Very well, that will save time.

Testimony of George E. Chapin, for Respondent.

GEORGE E. CHAPIN, called for the respondent, sworn.

Mr. BOLAND.—Q. Mr. Chapin, what was your business in August, 1917?

(Testimony of George E. Chapin.)

A. Claims agent of the Toyo Kisen Kaisha.

Q. And you are still? A. Yes.

Q. Reference has been made here to a shipment of cocoanut oil on the "Korea Maru" coming into this port in August, 1917. Did you see that shipment? A. I did.

Q. What was the occasion of your seeing the shipment?

A. They telephoned from the dock that it was leaking very badly, and asked me to come down and examine it on the wharf.

Q. You did so? A. I did so.

Q. Did you examine the cocoanut oil from both hold 5 and hold 7?

A. As far as I know, it was the cocoanut oil from both holds. I examined it on the north side of the pier, outside of the sheds.

Q. Was there any difference, so far as you observed, in the oil coming from hold 5 and hold 7?

A. None at all.

The COURT.—Did I understand you saw it coming from the hold, or saw it on the dock?

Mr. BOLAND.—On the dock, he said.

Q. You did not see it coming from the hold?

A. I did not see it coming from the hold.

Q. The condition was substantially the same?

A. All down the line; yes.

Q. Some barrels were full?

A. Some barrels were full.

Q. And some empty?

A. Some empty, some partly empty. [84]

(Testimony of George E. Chapin.)

Q. Were any of the barrels broken?

A. At that time I did not see any of the barrels that were broken. The records show that one barrel was broken; all of the rest were intact, that is, they were not broken.

Mr. BOLAND.—That is all.

Cross-examination.

Mr. McKEON.—If I may introduce these weights, I will do so, Mr. Boland. These are the weighers' certificates, if your Honor please, of the weights as discharged, and I will ask that they be marked as the next exhibit for libelant.

The COURT.—They will be admitted.

(The documents are marked "Libelant's Exhibits 9, 10 and 11.")

The WITNESS.—May I ask where these discharge weights were taken?

Mr. McKEON.—Here in San Francisco.

The WITNESS.—I mean at what point.

Mr. McKEON.—They were weighed on the dock.

The COURT.—How many certificates are there?

Mr. McKEON.—There are three.

The WITNESS.—Could I look at one?

Mr. McKEON.—Yes.

The WITNESS.—They are the same date, August 20th?

Mr. BOLAND.—Yes. We have copies of them, Mr. Chapin.

Mr. McKEON.—That is all.

(A recess was here taken until two P. M.) [85]

(Testimony of William J. Murray.)

AFTERNOON SESSION.

Mr. BOLAND.—Mr. McKeon has a statement to make.

Mr. McKEON.—It is a fact that these barrels were shipped in shook form—I think that is the expression—and assembled over in Manila, and then the cocoanut oil is loaded over there and transported here.

Mr. BOLAND.—They are new barrels?

Mr. McKEON.—That is, they are new wood.

Mr. BOLAND.—And they are kiln-dried?

Mr. McKEON.—That I am not prepared to admit definitely. I do not know.

The COURT.—I understand it is not admitted that they are kiln-dried, then?

Mr. McKEON.—I don't know that to be a fact.

Testimony of William J. Murray, for Respondent.

WILLIAM J. MURRAY, called for the respondent, sworn.

Mr. BOLAND.—Q. What is your business, Mr. Murray? A. Marine surveyor.

Q. How long have you been such?

A. Since last November.

Q. What was your business prior to that time?

A. Port superintendent.

Q. For whom?

A. The United States Shipping Board; prior to that the American-Hawaiian Steamship Company.

Q. For how many years, Mr. Murray?

A. Covering a period of eleven years.

(Testimony of William J. Murray.)

Q. As port superintendent, what, in general, were your duties?

A. General supervision of loading and discharging.

Q. Cargo?

A. Cargo, and upkeep of ships.

Q. The American-Hawaiian Steamship Company operate what kind of vessels?

A. Large steamers. [86]

Q. Approximately what tonnage?

A. Well, anywhere from 8,000 ton 14,000 tons deadweight carrying capacity.

Q. Now, you are a professional marine surveyor?

A. Marine surveyor.

Q. Have you had any experience with cocoanut oil? A. Yes.

Q. When, and in what capacity?

A. Well, as port superintendent and as marine surveyor both, supervising the handling of it.

Q. Did the American-Hawaiian Steamship Company carry cocoanut oil on its vessels? A. No.

Q. What was your experience with it as port superintendent?

A. General observation of it along the waterfront.

Q. Have you had any experience since that time as a surveyor? A. Yes.

Q. What experience has that been?

A. On a number of vessels discharging, and one in loading.

(Testimony of William J. Murray.)

Q. What was the reason for your being interested in it?

A. I was called on by merchants representing their various interests, and ship owners representing their own interests.

Q. Could you tell us from your experience what effect, if any, oil has upon a fir or pine barrel?

Mr. McKEON.—If your Honor please, I object to the question on the ground the witness is not qualified to pass upon what the effect of oil on barrels is.

The COURT.—I think after the answers he has given he has shown more than ordinary qualifications. I think your objection will go to the weight of his testimony, and not to its admissibility.

Mr. McKEON.—May I ask one or two questions on that line?

The COURT.—Yes, you may cross-examine him.

Mr. McKEON.—Q. Are you master mariner?

A. No.

Q. Have you ever been at sea?

A. I have been at sea; yes. [87]

Q. As what? A. On various vessels.

Q. As what?

A. Merely as a passenger.

Mr. McKEON.—That is all.

Mr. BOLAND.—I can qualify him some more. Have you observed barrels of cocoanut oil being loaded and unloaded? A. I have.

Q. Have you observed them being coopered?

A. Yes.

(Testimony of William J. Murray.)

Q. Will you explain what you have seen in that connection?

A. In discharging it is necessary to re-cooper them just as soon as you get them on the wharf.

Q. Why? A. Because they are slack.

Q. When you say they are slack, will you describe that to the Court?

A. The hoops were slack, and there was seepage on a warm day.

Q. What did they do in re-coopering, Mr. Murray?

A. Our general practice is to back off the loops, wrap the barrels with burlap, sand the barrels, dry the hoops, and dog them.

Q. Why do they sand these barrels?

A. In order to give the hoop a better grab on the barrel.

Q. A friction surface?

A. A friction surface.

Q. The burlap is to wipe off the barrel?

A. Yes.

Q. What is the purpose of the dogging?

A. Hold the hoop in place after they have driven it as far as they can.

Q. Why do they do all those things?

A. Because of the tendency, on account of the presence of the oil in the stave, would be to slip.

Q. Did you observe the condition of the barrels before that was done? A. Yes.

Q. What was it? A. Greasy.

Q. Leaking?

(Testimony of William J. Murray.)

A. Stained, with a content. [88]

Q. Were they leaking?

A. Where they were exposed to the sun.

Q. After that was done, they continued to seep, did they—after all those things were done, what would still happen, if anything?

A. If they were exposed to the heat of the sun, they would still continue to seep.

Q. Prior to their doing all of those things, what was the condition of the barrels containing coconut oil?

A. When they first came out of the vessel?

Q. Yes.

A. They were stained with the contents, the hoops were slack.

Q. Would any of them be leaking?

Mr. McKEON.—That is leading and suggestive.

Mr. BOLAND.—Go on and describe the condition.

A. Where they were exposed to the heat of the sun; yes.

Q. In all this observation, did you observe and form any conclusion as to what effect, if any, coconut oil would have upon a pine barrel?

A. Well, I don't know as it is any difference in the effect on a pine barrel or hardwood barrel.

Q. What is the effect, if any?

A. The general result is there is shrinking.

Q. The oil itself, causes the shrinking?

A. The shrinking of the container.

Mr. McKEON.—I object to that as leading and suggestive, and move to strike it out. It is the

(Testimony of William J. Murray.)

answer of Mr. Boland, instead of the witness.

Mr. BOLAND.—I merely repeated it.

The COURT.—He answered in substance to that effect.

The motion is denied.

Mr. BOLAND.—Q. Did you ever notice a deck cargo of cocoanut oil?

A. I have seen cargoes discharged from the deck.
[89]

Q. Did you or did you not notice whether there was any seepage on a deck cargo?

A. I have seen where there has been seepage on the deck.

Q. In connection with the questions I have just addressed to you regarding leakage, is there any difference between new and old barrels?

A. I would not attempt to answer that question.

Q. Are you familiar with the steamship "Korea Maru"?

A. Nothing other than a casual observer.

Q. You have been on board her, haven't you?

A. No.

Q. You have not been on board? A. No.

Q. Assume, Mr. Murray, that tank 5, so-called, is immediately abaft of the engine-room, that between it and the engine-room there is nothing but a steel bulkhead, with cargo battens, and that hold 7 is further aft, with hold 6 lying in between; that tank 5 does not go to the skin of the ship, but is flanked by water-tanks, and that hold 7 does go from skin to skin of the ship; assume that there is practically no

(Testimony of William J. Murray.)

ventilation, if any, in hold 5, and there is some slight ventilation in hold 7, and assume that cocoanut oil is loaded in both holds, and put on board at Manila in liquid state at a temperature of about 90, and the temperature varies for some days between 80 and 90, can you tell us whether it would make any difference as to the condition of that oil at the end of that voyage between the oil in hold 7 and hold 5?

Mr. McKEON.—I object to that upon the ground that it does not state the facts in evidence with reference to hold No. 7 as compared to the stowage in No. 5, the manner of the stowage, how the barrels were stowed.

Mr. BOLAND.—I will add, the stowage in each instance was good stowage. [90]

Mr. McKEON.—I object to that further on the ground that “good stowage” does not indicate in what manner the barrels were stowed in No. 5 or 7 hold, whether they were stowed on end or stowed on the side.

The COURT.—The objection will be overruled.

Mr. McKEON.—Exception.

Mr. BOLAND.—Q. Would you like to have the reporter read the question?

A. I think I have got the drift of it. You might read the question. (Question read.) I should say this, that in No. 5, that you speak of as a tank with tanks on either side between No. 5 proper and the skin of the ship, that that atmospheric temperature that the oil contained when loaded would not be affected by the radiation of sea water on the shell of

(Testimony of William J. Murray.)

the ship, the ship's hull, in No. 5 hold, as it would be in No. 7. In other words, the radiation of the sea water on the ship's hull would have a tendency to lower the temperature of No. 7, and consequently the oil that was loaded in No. 7 earlier than that stowed in No. 5.

Q. Would that have any difference in the amount of seepage of the barrels in the two holds?

A. Well, we know very well when the oil is once congealed or starts to solidify, that the seepage is less than when it is in a liquid form.

Q. Now, taking from that point, assume that upon arrival here the oil in both of the holds referred to is liquid, would it make any difference?

A. As to the seepage?

Q. Yes. A. I should not think that it would.

Mr. BOLAND.—That is all.

Cross-examination.

Mr. McKEON.—Q. Mr. Murray, what ships have you surveyed?

A. I have surveyed the "Flying Cloud," the "Billerton," the "L'Avenir," the "Itanca." [91]

Q. What was the cause of the heating in the "Flying Cloud"?

A. That is a question that I do not consider it is proper for me to answer.

The COURT.—Is it still pending? A. Yes.

Mr. McKEON.—I will withdraw the question.

The COURT.—The objection is sustained.

Mr. McKEON.—Q. The "Flying Cloud" had

(Testimony of William J. Murray.)

broken copra all around it, didn't it?

A. That is a question I am not to answer, as to the "Flying Cloud."

Q. That is only a fact.

The COURT.—That is a matter that must have been manifest, and I will require you to answer that. A. Yes.

Mr. McKEON.—So did the "L'Avenir," Mr. Murray: That is true, is it not? A. Yes.

Q. Do you know whether Copra has any heating qualities at all?

The COURT.—I will sustain the objection as to that. You can prove that by somebody else, if it is important.

Mr. McKEON.—You mentioned something about the sun having effect on barrels of cocoanut oil.

A. Yes.

Q. What is there in the sun that has an effect on it? A. Heat.

Q. Then you think that heat does affect barrels of cocoanut oil? A. Yes.

Q. How does it affect them?

A. Well, it renders them in a soluble form.

Q. What is the effect upon it when it is in that form.

A. Seepage—I am speaking now of wood containers.

Q. What effect has it on wood containers, heat?

A. The oil or the heat?

Q. The heat.

A. Well, I would be inclined to say that the com-

(Testimony of William J. Murray.)

bined effect of the heat on the oil and the barrel renders [92] it susceptible to seepage.

Q. If No. 5 tank about which you have testified was much hotter than No. 7 hold, wouldn't the leakage in No. 5 be greater because of that heat than No. 7?

A. If the temperature of No. 5 was higher than No. 7?

Q. Yes. A. I should say so.

Q. What would you say, Mr. Murray, if the temperature of No. 7 was 75, and the temperature of No. 5 was 120? A. Well, I think—

Q. (Intg.) You think you would not have any oil inside at all?

A. No, not exactly; I think your oil would be of a lighter consistency.

Q. You would have greater leakage, wouldn't you?

A. You would have a leakage where the consistency is lighter.

Q. You would have a leakage where you find the hottest place, wouldn't you, a greater leakage?

A. With the condition of the oil, the oil being in a soluble form, yes.

Q. Assume, Mr. Murray, that the oil in No. 7 and in 5 tank are in liquid form, and you have the greatest quantity of heat in No. 5 tank. Isn't there bound to be more leakage in No. 5 than in No. 7?

A. Naturally, you would expect some.

Q. Don't you always re-cooper barrels after they are handled?

(Testimony of William J. Murray.)

A. Particularly with a nonviscous oil.

Q. But you always re-cooper barrels after being handled with cargo, don't you?

A. With a nonviscous oil, yes.

Q. What do you mean by a "nonviscous oil?"

A. Lacking the sticky propensities and qualities that a lubricating oil, for instance, will have; it makes it more susceptible to seepage, flow.

Mr. McKEON.—I think that is all. [93]

Redirect Examination.

Mr. BOLAND.—Q. You used the word "soluble," Mr. Murray. I presume you meant liquid—soluble means that it could be dissolved in some liquid—you mean liquid?

A. Yes.

Mr. McKEON.—Q. When did you commence to be a marine surveyor?

A. Last November.

Q. 1918? A. 1918.

Testimony of Lebeus Curtis for Respondent.

LEBEUS CURTIS, called for the respondent, sworn.

Mr. BOLAND.—Q. What is your business?

A. Marine surveyor.

Q. How long have you been such?

A. Since 1912.

Q. By whom, in general, are you employed?

A. Shipowners, underwriters, shippers of cargo.

Q. What was your business before that?

(Testimony of Lebeus Curtis.)

A. As a shipmaster.

Q. For how many years, Captain?

A. Approximately six years shipmaster.

Q. Went to sea? A. Yes.

Q. What concern did you sail for?

A. As a ship master I sailed for the Union Oil last.

Q. The Union Oil Company last? A. Yes.

Q. On what vessel?

A. On the steamer "Santa Maria," "Santa Rita," the "Hectan," "Argyle," "Roamer."

Q. Did you ever have any experience loading and discharging cargo? A. Yes, a great deal.

Q. What was that as?

A. That was as a chief officer and second officer in the American Hawaiian Steamship Company, and various other companies carrying general merchandise.

Q. Have you had any experience with cocoanut oil?

A. In the past two or three years I have had a lot of experience with it.

Q. Did you have any prior to that time?

A. No. [94]

Q. Only the last two or three years?

A. Only the last two or three years.

Q. What experience, will you describe generally, have you had in the last two or three years to qualify yourself?

A. I have been acting as a surveyor on perhaps seven or eight cargoes of cocoanut oil in wooden

(Testimony of Lebeus Curtis.)

barrels that have been discharged at this port.

Q. You made an investigation of its condition, and its effect upon the barrels, and so on, did you?

A. Yes.

Q. In that connection? A. Yes.

Q. You are at the present time engaged upon some of the vessels that have been referred to here in the testimony, have you? A. Yes.

Q. Have you formed any opinion, by reason of your experience, of the effect, if any, of cocoanut oil upon a pine barrel?

A. Yes, I have formed the opinion that cocoanut oil shrinks pine barrels.

Q. When it is in liquid form?

A. When it is in liquid form, yes.

Q. In liquid form, do you find there is always some seepage? A. Always, yes.

Q. Are you familiar with the steamship "Korea Maru"? A. Yes.

Q. Before we get to that, have you ever seen any seepage of cocoanut oil in pine barrels in an on-deck cargo?

A. Yes, I saw two cargoes that arrived at this port on the steamer "Colusa," stowed on deck; in both cases, there was considerable seepage.

Q. Now, getting back again to your experience and observation as to shrinkage by reason of oil being in liquid form, does it make any difference, in your judgment, between new and old barrels?

A. I don't think I know positively whether the barrels I have seen have been new or old. [95]

(Testimony of Lebeus Curtis.)

Q. Have you come to any conclusion on that subject at all that you feel sufficiently informed upon to announce? A. I have come to a conclusion.

Mr. McKEON.—I will not admit his qualifications on that subject, if your Honor please, and for that reason I object to it.

The COURT.—The objection is sustained.

Mr. BOLAND.—Q. You say you do know the “Korea Maru”?

A. Yes.

Q. Do you know the location of the so-called tank 5? A. Yes.

Q. And the so-called hold 7? A. Yes.

Q. Would there be any difference as to the seepage or leakage of cocoanut oil, liquid cocoanut oil, in pine barrels, as between the two holds?

Mr. McKEON.—Assuming that they are stowed the same?

Mr. BOLAND.—Assuming that there is good stowage in each instance, that any leakage does not occur by reason of bad stowage.

A. There might be a difference, of more leakage in No. 5, if the temperature is very much higher in it than it was in 7.

The COURT.—Did you say yes, or if it was?

A. If it was very much higher.

Mr. BOLAND.—Q. Would there be any appreciable difference? A. I would not think so.

The COURT.—You would or would not?

A. I would not; if the containers were sufficient to carry liquid cargo, I do not think there would be

(Testimony of Lebeus Curtis.)

any difference, if they were all good containers.

Mr. BOLAND.—Q. Assume that some of the oil from either or both of these holds escapes and goes into the scuppers, and from there into the bilges, would it be possible, during the [96] voyage to save any of that oil that would thus get into the bilges?

Mr. McKEON.—Just a minute. Captain, have you ever been in the engine-room of the “Korea Maru”?

A. No.

Mr. McKEON.—For that reason I interpose an objection upon the ground the witness is not qualified. He says he has not been down in the engine-room.

The COURT.—The objection is sustained.

Mr. BOLAND.—You don’t know about the location of the bilges in the “Korea Maru”?

A. I know the general location of the bilges, but I am not familiar with the bilge connections and suction, the pipe arrangement.

Q. You don’t know whether there would be any chance of saving the oil, or not?

Mr. McKEON.—I again interpose the objection, if your Honor please, that the witness is not familiar with the construction of the lower portion of that ship.

The COURT.—He is asking whether he knows or not. The objection is overruled.

A. No, I don’t know positively.

Mr. BOLAND.—That is all.

(Testimony of Lebeus Curtis.)

Cross-examination.

Mr. McKEON.—Q. Captain, you are the marine surveyor for the T. K. K. Line, aren't you?

A. I am employed by them at times.

Q. You do all of their work, don't you?

A. Not all of it.

Q. Not all of it? A. No.

Q. Every time it is possible to get you, you are in their employ, aren't you, Captain?

A. I think so.

Q. And it is only in those cases, when you are on the other side of the fence, that you are not employed by the T. K. K.? [97]

A. No; they frequently employ Captain Wallace, if I am not available, if I am out of town, or something of that sort.

Q. The vessels that you mentioned that you have been master of are all oil-tankers, are they not?

A. Yes.

Q. They are not general cargo ships? A. No.

Q. That is where all of your experience as a master mariner has been? A. As a master, yes.

Q. Do you think heat has any effect on cocoanut oil in barrels, Captain? A. Yes.

Q. Are you familiar with No. 5 tank of the "Korea"? A. Yes.

Q. When did you examine it?

A. Day before yesterday.

Q. Referring to Libelant's Exhibit No. 2, is that the tank?

A. It looks like a picture of a portion of it.

(Testimony of Lebeus Curtis.)

Q. What is that upright there?

A. That is the ventilator or escape from the shaft recess to the upper deck.

Q. Has it any opening into No. 5 tank other than that door you see there? A. No.

Q. Referring to Libelant's Exhibit No. 3, that is the top of that emergency escape, is it not?

A. Yes.

Q. Is that top constructed as a ventilator?

A. As an uptake ventilator.

Q. It does not take any air in? A. No.

Q. Assuming, Captain, that that No. 5 tank had the cargo hatches on top and cargo stowed seven feet on top of that to the ceiling of the 'tween-decks, and these doors opening out from the emergency escapes were closed, would that compartment get a bit of ventilation? A. No, not at all.

Q. That tank is right directly abaft the engine-room, isn't it? A. Yes.

Q. Would the heat of the engine-room have any effect on that tank? A. Oh, yes. [98]

Q. What effect would it have on that tank?

A. It would make it warmer.

Q. There is not any engine-room alongside of No. 7, is there?

A. No; there is a shaft alley through there, two shaft alleys.

Q. Through where?

A. Through the bottom of No. 7 hold; they connect directly with the engine-room.

Q. What is the purpose of the shaft alley?

(Testimony of Lebeus Curtis.)

A. It is the alley that the shaft from the engine to the propeller runs in.

Q. All the ventilators open into the shaft alley, or pretty nearly all the ventilators open into the shaft alley? A. No, not all of them.

Q. The shaft alley is a pretty cool place?

A. Yes.

Mr. McKEON.—I think that is all, Captain.

The COURT.—Is the engine-room forward or aft of No. 5?

Mr. McKEON.—It is directly forward, if your Honor please.

The COURT.—That is the impression I got.

Mr. McKEON.—Right alongside of it.

Testimony of R. E. Sanborn, for Respondent.

R. E. SANBORN, called for the respondent, sworn.

The COURT.—Does the shaft alley run under No. 5, or through No. 5?

Mr. McKEON.—It does not run under No. 5 or through No. 5.

The COURT.—Then if the engine is forward of No. 5, how does the shaft connect up with the engine?

Mr. McKEON.—The shaft alley does not connect up with the engine; it opens into the engine-room.

The COURT.—The only thing I had in mind is, are you both agreed that the shaft alley does not run through No. 5?

Mr. BOLAND.—No, we are not agreed.

(Testimony of R. E. Sanborn.)

Mr. McKEON.—There is a witness here who knows the ship [99] from A to Z; you can put him on the stand.

The COURT.—Your position is that owing to the fact that these water tanks were outside of No. 5—

Mr. McKEON.—The water tanks are on both sides of No. 5, your Honor.

The COURT.—The thought simply came into my mind; however, you are trying the case.

Mr. McKEON.—I will convince your Honor of that with a witness here.

Mr. BOLAND.—Q. Mr. Sanborn, what is your occupation or profession? A. Chemist.

Q. You are a graduate chemist? A. I am.

Q. From what university?

A. Stanford University.

Q. How long ago? A. I graduated in 1911.

Q. And your business since?

A. I have been employed in various chemical laboratories since that time.

Q. You are what would be called a commercial chemist? A. Yes.

Q. Your present employment is what?

A. Chief chemist for Gould & Nash.

Q. Have you had any experience, in your chemical profession, with cocoanut oil? A. I have.

Q. And cocoanut oil in pine containers, pine barrels as well?

A. Well, in barrels of various kinds; I have no doubt pine barrels were among them.

(Testimony of R. E. Sanborn.)

Q. You have heard the testimony here this afternoon? A. I have.

Q. You have heard the testimony that oil containers shrink, wooden barrels, pine barrels?

A. I have.

Q. From your chemical experience, Mr. Sanborn, can you give us any information as to why that could occur, if it does occur?

A. All barrels in a commercial condition, so to speak, that is, as they would be met with in commerce, have more or less water [100] in the wood fibre, and water in contact with cellular material of all kinds tends to swell it; there is a *quasi*-chemical combination takes place there, so that the volume of the whole is much greater than the sum of the volumes of water and wood separately; that combination does not take place in the case of oil, and consequently when the water of a wood is driven out by one cause or another and is replaced by oil, there will be shrinkage. In other words, the sum of the volume of the oil and the volume of the wood would practically represent the volume of the two in combination.

Q. And there is an apparent shrinkage?

A. Yes.

Q. Does the oil, itself, tend to drive the water out? You spoke of driving the water out of the wood by one means or another. Does the oil, itself, tend to do that?

A. Yes, there is a tendency, if the wood is not properly protected, for the oil to penetrate into the

(Testimony of R. E. Sanborn.)

wood and for the water which may escape as a vapor at the surface to be driven out.

Q. At what point of temperature does cocoanut oil solidify?

A. As we define solidification as the temperature at which a solid does not flow, a mass is formed at about 65 degrees, Fahrenheit; that varies within narrow limits, two or three degrees, for cocoanut oils from different sources.

Q. What is the liquefying point, if it is any different from the solidifying point?

A. The liquefying point, as defined as the point at which the oil becomes a clear liquid is approximately ten degrees higher.

Q. About 75 degrees? A. Yes.

Q. There is then a difference of ten degrees at which the oil would solidify or liquefy, depending upon whether the temperature was going up or down?

A. At which the oil would be more or less of a mushy mass, you might describe it. [101]

Q. In other words, if oil were liquid at, say, 80 degrees, and the temperature were going down it would become congealed or coagulated—which would you call it? A. Congealed.

Q. (Continuing.) At 75, and become a solid at 65?

A. Yes, to use different temperatures for illustration, as I said the temperature varies slightly.

Q. On the other hand, if the temperature were going up, it would be solid at 65 and gradually

(Testimony of R. E. Sanborn.)

liquefy until it were a clear liquid at 75? A. Yes.

Q. Will you tell us, Mr. Sanborn, what expansion there is in cocoanut oil, liquid cocoanut oil, in a rising temperature? You can illustrate your answer if you care to.

A. There is an expansion of approximately .02 of 1 per cent for every degree of rise in temperature.

Q. Can you tell us in our language how much that would be in the rise of temperature in say 80 and 110 degrees?

A. It would amount to about .1 of 1 per cent; in other words, about .05 of a gallon to a barrel of oil, assuming a 50-gallon barrel—they will vary in sizes.

The COURT.—You said .02 of 1 per cent in every degree of rise in temperature? A. Yes.

Q. That would be 30 times?

A. I understood you to say 80 to 100, which would be 20 times; but it is merely a matter of calculation.

Mr. BOLAND.—That is all.

Cross-examination.

Mr. McKEON.—Q. If the interior of the barrels is glued, they are protected, somewhat, are they not?
[102]

Mr. BOLAND.—I object to the question on the ground it is not apparent that there was any glue inside these barrels, so far.

The COURT.—This man is an expert, and they have a right to test him.

(Testimony of R. E. Sanborn.)

Mr. BOLAND.—I will withdraw the objection.

Mr. McKEON.—Read the question.

(Question repeated by the reporter.)

A. Yes, they are protected somewhat.

Q. I believe you said that heat affected cocoanut oil in barrels, didn't you?

A. I don't know that I said it, but it does.

Q. And the hotter it gets, the more effect it has; isn't that so? A. Effect is a broad term.

Q. The more opportunity there is for the leakage.

Mr. BOLAND.—I object to the question as being too indefinite.

The COURT.—The objection is overruled.

A. The higher the temperature the lower would be the viscosity, or, conversely, the higher would be the fluidity of the oil, and consequently the greater would be the rate of flow through a given orifice.

Mr. McKEON.—That is all.

Mr. BOLAND.—That is all.

Testimony of James McCarthy, for Respondent.

JAMES McCARTHY, called for the respondent, sworn.

Mr. BOLAND.—Q. What is your business, Mr. McCarthy? A. Foreman stevedore.

Q. Where? A. Now for the T. K. K.

Q. What were you doing in August, or thereabouts, 1917?

A. I was foreman for Mr. Dunn. [103]

Q. What were you doing at that time?

A. Foreman sorter.

Q. At that time, in August, or thereabouts, 1917,

(Testimony of James McCarthy.)

were you working on the T. K. K. dock?

A. Yes.

Q. Employed by whom? A. By Mr. Dunn.

Q. Do you remember a shipment of cocoanut oil on the "Korea Maru" about that time? A. I do.

Q. In tank 5 and hold 7? A. Yes.

Q. Did you see that come out of the hold?

A. I did.

Q. Where was it put on the dock?

A. Well, some was put on the north and some on the south side; No. 7 hatch was put on the north side of the dock, and No. 5 hatch, some put on the south side and some put on the north side.

Q. Put on together with the No. 7?

A. With the No. 7, yes.

Q. What was the condition of the oil as it came out? A. It was in very bad condition.

Q. Out of 5, was it?

A. Yes, out of both hatches, in bad condition.

Q. Out of 7, too? A. Yes.

Q. The same condition, practically?

A. Practically the same condition, hoops loose, hoops off the barrel, barrels empty.

Q. Some of them empty?

A. Some of them empty, some of them partly empty.

Q. Did you see any broken barrels?

A. I did not notice any broken barrels at all.

Q. Loose hoops? A. Loose hoops, yes.

Q. How long have you been a stevedore?

A. About 20 years.

(Testimony of James McCarthy.)

Q. Working where?

A. Well, I worked for the Pacific Mail for 13 years—about 15 years, and 5 years for Dunn and the T. K. K.

Q. Did you ever see cocoanut oil unloaded before?

A. I did with the Pacific Mail. [104]

Q. Did you ever see a perfect shipment?

A. No. I saw one shipment come out of one of the Pacific Mail boats as bad as this shipment, every bit as bad, and every other shipment there was more or less leakage.

Q. What do they do when it comes out?

A. Put it on the dock, and as a general rule they get coopers and re-cooper it.

Mr. BOLAND.—That is all.

Cross-examination.

Mr. McKEON.—Q. Are there any tracks on the north side of the dock?

A. No; the tracks are in the middle of the dock.

Q. How many barrels came out of No. 7?

A. I don't really remember; there was more coming out of No. 7 than out of No. 5.

Q. You are sure of that, are you? A. Yes.

Q. You are just as certain of that fact as that they both came out in the same condition?

A. I think I am pretty near certain of that, that more came out of 7 than out of 5.

Q. Did you keep any tally?

A. No, we never count the barrels.

Q. Did you take any markings of these barrels?

(Testimony of James McCarthy.)

A. How do you mean?

Q. Any written record of the barrels as they came out? A. I think I did.

Mr. McKEON.—I demand the production of those records, if your Honor please.

A. I am not positive whether I did or not, but as a general rule we do take records of it.

Mr. McKEON.—I demand the production of the records, showing what came out of No. 7 and what came out of No. 5.

A. We do not make any record of how many barrels come out of 7 and how many out of 5; we don't keep a record of that; we only keep a record of the condition of the barrels.

Mr. McKEON.—I want that record.

The COURT.—This witness was employed by an independent [105] company?

Mr. BOLAND.—He was at the time; he was in the employ af Dunn.

The COURT.—Is this data in any way under your control?

Mr. BOLAND.—It is not. There is a list of the barrels as they were delivered to the consignee, and their condition; I think Mr. McKeon has a copy of that.

The COURT.—You will have to show in some way it is in the control of the respondent before I can order it done.

Mr. McKEON.—If your Honor please, this witness was in the employ of the contractor who was in the employ of the T. K. K. Line discharging this

(Testimony of James McCarthy.)

cargo, and this witness has been continuously in the employ for the last several years of the T. K. K. Line. Isn't that the fact, Mr. McCarthy?

A. Yes.

Mr. McKEON.—The mere fact that a contractor was discharging T. K. K. ships does not put beyond their control the written evidence.

The COURT.—You will have to show where it is.

Mr. BOLAND.—If there is any record, I will be glad to produce it; I have given and will give Mr. McKeon access to everything we have. We will cause a search to be made for any records in that respect that we may have. But I do not believe any exists, as a matter of fact.

Mr. McKEON.—You are in the employ of the T. K. K. Line now, aren't you? A. Yes.

Q. What are your duties on the dock?

A. Head sorter.

Q. Just what does that mean?

A. That is looking after the cargo coming out of the ships, to see that it is properly put in places on the dock.

Q. You are all over the dock, I suppose?

A. Yes, all over the dock. [106]

Q. You are not confined to any particular hatch?

A. No; all over the dock.

Q. You are not at No. 5 hatch for any particular length of time, or at No. 7 hatch any particular length of time?

A. I am at one end of the ship to the other, but

(Testimony of James McCarthy.)

any damaged goods come out of the ship they notify me.

Q. How long is the ship?

A. I suppose about 600 feet.

Q. Do you sort the barrels after they get on the dock? A. Yes.

Testimony of William J. Barry, for Respondent.

WILLIAM J. BARRY, called for the respondent, sworn.

Mr. BOLAND.—Q. What is your business?

A. Stevedore.

Q. Where?

A. With the T. K. K. at the present time.

Q. Employed by them? A. Yes.

Q. At the dock? A. Yes.

Q. Where were you employed in August, 1917?

A. I was employed on Pier 34.

Q. Who by?

A. By William Dunn, the contractor.

Q. Working on T. K. K. work at that time, weren't you? A. Yes.

Q. Under Dunn? A. Yes.

Q. Do you remember a shipment of cocoanut oil on the "Korea Maru" in August—about August, 1917? A. I do.

Q. What was your business at that time?

A. I was tending to the sorting at the after-end of the steamer, sorting cargo.

Q. Did you see any of these barrels as they came out of the hold? A. Yes.

(Testimony of William J. Barry.)

Q. What holds were they in?

A. No. 5 and 7,—5 tank and 7 hold.

Q. What was the condition of the barrels that came out of No. 5?

A. They were pretty near the same as No. 7, all leaking.

Q. All leaking? A. Yes. [107]

Q. Some empty? A. Some empty, yes.

Q. And some full?

A. Some full; the hoops were loose on them; we used to hammer the hoops down with our hooks.

Mr. McKEON.—I might suggest that the witness be permitted to testify.

Mr. BOLAND.—Q. Where were they placed on the dock, do you remember?

A. Part of them were placed on the south side, and two-thirds of them placed on the north side, that is, to keep them away from the sun, placing them on the north side of the dock,

Q. Some were placed on the south side?

A. Yes, but two-thirds of the consignment on the north side.

Q. Were any of the barrels broken, Mr. Barry?

A. Not that I could see.

Q. Your opinion is they were about the same?

A. Yes.

Q. From the two holds?

A. Yes, from the two holds; all on the north side of the dock it was covered with cocoanut oil, running down to the bay, where the barrels were leaking, the whole end of the wharf.

(Testimony of William J. Barry.)

Mr. McKEON.—I move to strike out the answer of the witness as expressing his opinion and not the fact. I did not want to interrupt him.

Mr. BOLAND.—Let that be stricken out.

The COURT.—It will be stricken out.

Mr. BOLAND.—Q. Is it a fact, or is it not a fact that the barrels of oil that came out of hold 7 and the barrels of oil that came out of hold 5 were the same?

Mr. McKEON.—I object to that on the ground it calls for the conclusion of the witness. Let him describe the barrels.

The COURT.—The objection is overruled.

Mr. BOLAND.—I will withdraw the question. He has already [108] testified as to that. It is only repetition. Take the witness.

Cross-examination.

Mr. McKEON.—Q. You were also sorting on the dock? A. Yes.

Q. You were not up on the ship? A. No.

Q. You assorted the cargo after it got on the dock? A. On the wharf; yes.

Q. You were not stationed at any particular hatch?

A. No; no particular hatch; at the after end of the steamer I was stationed, where the oil came out of it.

Q. You are still in the employ of the T. K. K., are you? A. Yes.

Q. You have been continuously, haven't you?

A. Yes.

(Testimony of William J. Barry.)

Q. You are one of their regular stevedores?

A. Yes.

Q. When did you first talk to anyone about your testimony to be given to-day?

A. The first time anybody spoke to me was last Monday.

Q. Last Monday? A. Yes.

Q. The 24th of March? A. Yes.

Q. Who spoke to you? A. Mr. McCarthy.

Q. What proportion of the barrels that you assorted came out of No. 5, if you did assort any, were leaking? A. No. 5 and 7?

Q. No. 5.

A. There was not much difference in any hold.

Q. What proportion of the barrels that came out of No. 5 were leaking?

A. Well, you took a general exception to all of them.

Q. To all of them?

A. Yes, all of them; you took an exception to the condition of the barrels, they were all leaking, more or less.

Q. They were actually dripping as they were pulled out of the hold, weren't they?

A. Yes, two-thirds of the side of the dock was covered with oil that leaked from these barrels.

Q. I am talking about No. 5 now.

A. This would take in both.

Q. I am talking about 5; just forget about No. 7 for a minute. [109] You say that all of the barrels that came out of No. 5 were leaking?

(Testimony of William J. Barry.)

A. More or less leaking, yes.

Q. How many barrels came out of No. 5?

A. That I could not say; I kept no record of how many came out of that hatch; we never do.

Q. What percentage of barrels that came out of No. 7 were leaking?

A. Well, pretty near the same.

Q. Pretty near the same?

A. The same as No. 5.

Q. What do you mean by "pretty near"—not quite? A. Looking in the same condition, about.

Q. They had hoops off?

A. Yes, hoops loose, and some barrels empty.

Q. The oil just came streaming out of them?

A. Yes, all over the wharf.

Q. How many barrels came out of No. 7?

A. That I don't know; I kept no record of it.

Q. What proportion of the whole shipment of barrels came out of No. 7? A. That I could not say,

Q. Was there a greater quantity that came out of No. 7 than No. 5, or *vice versa*?

A. There might be more in No. 5; that I am not positive of; I would not say positively.

Q. There were more in 5?

A. I would not say positively.

Q. You don't know what proportion of the whole shipment came out of either place? A. No.

Q. Would you say that the greatest quantity came out of 7 rather than out of 5?

A. That there was more barrels come out of 7 than 5?

(Testimony of William J. Barry.)

Q. Yes.

A. I have already said I couldn't answer that question.

Q. You don't know? A. I don't know.

Q. Your recollection is not very good?

A. My recollection is very good in regard to that work. [110]

Mr. McKEON.—That is all.

Testimony of James Gibson, for Respondent.

JAMES GIBSON, called for the respondent, sworn.

Mr. BOLAND.—Q. Mr. Gibson, what is your business? A. Stevedore.

Q. Where, now? A. T. K. K.

Q. What were you doing in 1917, in August?

A. Stevedoring for W. T. Dunn.

Q. He was the contracting stevedore for the T. K. K. at the same time? A. He was at the time.

Q. What capacity did you occupy with Dunn?

A. Foreman stevedore.

Q. Do you recall a shipment of cocoanut oil on the "Korea Maru" in August, 1917?

A. I do, very well.

Q. Did you see it? A. I did.

Q. Where was it stowed?

A. No. 5 and No. 77—No. 5 tank and No. 7 hold.

Q. Did you see some of it come out of those two holds? A. I certainly did.

Q. What was the condition of that in hold 5?

A. It was all bad; we had to hoist it in net slings.

(Testimony of James Gibson.)

Q. What was the condition of that in No. 5?

A. It was all the same, so bad we had to hoist it in net slings, couldn't hoist it in rope slings, because it would slip out.

Q. Did you see any broken barrels? A. No.

Q. Just leaking? A. Yes.

Cross-examination.

Mr. McKEON.—Q. The condition of these barrels in No. 7 was so bad that anybody who had a chance of seeing them could not mistake saying they were all in bad condition? [111]

A. We hoisted them all out in net slings.

Q. That is not my question.

A. It is quite a while ago to remember back.

Q. When did you first start to talk about it?

A. Monday of this week; in fact, until they called me I had forgotten all about the thing, until I was ordered up here for the trial.

Q. When did you first speak about it?

A. I think last week some time, when I was ordered up here.

Q. Who ordered you? A. I forget now.

Q. Who had spoken to you about it?

A. Nobody spoke to me about it. I was told to appear up here.

Q. You have not talked to Mr. Boland about it?

A. Who?

Q. Mr. Boland, this gentleman here.

A. No, I don't know him.

Q. You have not talked to Mr. Chapin about it?

(Testimony of James Gibson.)

A. I forget who it was that told me; somebody told me I had to appear here.

Q. I will now repeat the question I asked a moment ago, that the condition of the barrels that came out of No. 7 was so bad that anyone seeing them could not mistake saying they were in bad condition, could they? A. We hoisted them out in nets.

Q. What has that got to do with the condition?

A. The condition has this to do, that we could not hoist them out with rope slings, because they would slip out, they were so bad.

Q. Was the condition of the barrels in No. 7 so bad that anyone there could not mistake saying they were in bad condition?

A. I could not tell you that. I am just telling you how we hoisted them out in net slings.

Q. Do you remember anything except the nets?

A. I remember that we put No. 5 on the south side and No. 7 on the north side, until we got the dock filled up on the south side, and then we put some of No. 5 on the north side.

Q. You remember the net, and you remember putting some on the [112] north side and south side. Now, do you remember anything else?

A. It is so long ago, it is a year ago in August, and I never gave the thing another thought after that.

Q. From what you saw of No. 5 would you say that anyone who saw No. 5 could not mistake saying that they were in bad condition?

A. Well, I will tell you about No. 5.

(Testimony of James Gibson.)

Q. (Intg.) I should have said No. 7.

A. The man who had charge of the after end of the hold, he had his leg broken the last time the "Tenyo Maru" was in, and he probably could tell you more than I could about it, because I am up and down the dock, and I did not pay any particular attention to any hatch at the time, only that I know about the condition of this oil.

Q. You were all up and down?

A. I am all up and down.

Q. You are general overseer?

A. General overseer.

Q. Watching all the cargo that comes out, general cargo? A. Watch all the cargo.

Q. After the cargo got on the dock, did you pay any further attention to it?

A. This much, that Mr. Roberts told me he thought it congealed just as soon as cool air would reach it, and it happened to be in the hot sun at the time, and I noticed it ran for quite a while, I guess until evening came along and it got cool.

Q. Heat has some effect on it, has it?

A. You can't prove that by me. I don't know a thing technically about this thing at all.

Q. As a matter of fact, some of these barrels were in good condition, weren't they?

A. I don't know anything about those barrels. I have been told that they go out there in a knocked down condition.

Q. You were told that?

A. In fact I have seen them go out [113] in a

(Testimony of James Gibson.)

knocked down condition, and they are supposed to come back with oil in.

Q. Do you know whether any of these barrels were in good condition?

A. I don't know anything about it. I simply know that I discharged the cargo, and when I discharged it I discharged it in net slings, it was all in bad condition, and that is all I know.

Q. Do you know how many barrels came out of No. 7?

A. No; I could not tell you accurately; I think there was one-third in one hatch and two-thirds in the other.

Q. But you don't know how it was divided, how much in 5 and how much in 7?

A. I could not say for sure, but I think there was a shipment of something like 520, or 500 and something, like that.

Q. You don't know how it was divided between 5 and 7?

A. No, I could not tell you right now, because I never gave the thing a thought; but I think that was the shipment, somewhere around 500.

The COURT.—Isn't there a loading record somewhere of the amount that went in?

The WITNESS.—There ought to be something.

Mr. BOLAND.—As a matter of fact, we know about the proportion of the different hatches; Mr. McKeon knows.

Mr. McKEON.—I know the number that was in each.

(Testimony of James Gibson.)

Mr. BOLAND.—But this man does not know.

A. It is my business there to get freight out and freight in; I don't pay any particular attention to that.

Mr. McKEON.—Q. How many barrels in the total shipment were damaged?

A. I could not tell you that; I don't know; all I know it was all running out, and we, in fact, threw a lot of light barrels on top on both the north and south sides. [114]

Q. Were they all damaged?

A. I am telling you, it is a long time ago and I cannot particularly remember it. The only thing I remember is we hoisted them out in net slings from both hatches.

Q. Do you know the names of any other stevedores that were in No. 7 hold?

A. Well, I might try to find them out.

Q. You don't remember?

A. Not offhand; no.

Q. You are in the employ of the T. K. K., still, aren't you? A. Yes.

Mr. BOLAND.—With the exception of one other witness, your Honor, that is our case; the only remaining question is the inference that might be drawn from some of the questions asked the witnesses as to the possibility of separating any oil from bilge water in the bilges during the voyage; I really did not appreciate that that might not be suggested, and we have asked one of the engineers on the vessel who is there now to come out here,

(Testimony of James Gibson.)

but I do not know what time he will get here.

The COURT.—That is as far as that testimony will go?

Mr. BOLAND.—Yes, the only point of this is to show it would be impossible during the voyage to separate it in the bilges, that the bilges have to be pumped, and continuously pumped, and it is practically an impossibility to separate it until they come to the end of the voyage, and then it hardens and they take it out, and some was taken out; but otherwise it was impossible.

The COURT.—Are you ready to proceed with your rebuttal?

Mr. McKEON.—Yes. [115]

Testimony of W. F. Broderick, for Libelant (In-Rebuttal).

W. F. BRODERICK, called for the libelant in rebuttal, sworn.

Mr. McKEON.—Q. Mr. Broderick, what is your business?

A. I am a salesman for the California Barrel Company.

Q. The barrels that you manufacture are constructed of what?

A. We make barrels of different materials; we make oak barrels, we make barrels of Douglas fir, we make barrels of spruce.

Q. Do you recall the type of barrels that you have been selling to Willits & Patterson?

A. I think we have been selling the Douglas fir

(Testimony of W. F. Broderick.)

barrels to Willits & Patterson; we might have sold them some oak barrels, also; that I am not sure of.

Q. Mr. Broderick, has heat any effect upon a barrel? A. Yes.

Q. On any kind of a barrel? A. Yes.

Q. What effect has it?

Mr. BOLAND.—If your Honor please, I object upon the ground that this is not rebuttal testimony. This would be a part of their opening case, and not in the nature of rebuttal.

The COURT.—I will overrule the objection.

A. Heat would have the effect—

Mr. BOLAND.—I will amplify the objection and specify this, that these barrels involved in this case were filled with cocoanut oil, and the effect of heat in an abstract sense upon a barrel not on board a ship and not containing cocoanut oil is immaterial, irrelevant and incompetent.

The COURT.—There is a possibility that it might be, but I will overrule the objection.

A. Heat would have the effect of shrinking barrels.

Mr. McKEON.—Q. If the barrels contained cocoanut oil and they shrunk, would or would not that permit the cocoanut oil to leak?

Mr. BOLAND.—I object to that upon the ground that the witness [116] is not qualified to testify as to the idiosyncracies of cocoanut oil.

The COURT.—That is almost manifest. I sustain the objection, as long as he has not qualified on cocoanut oil.

(Testimony of W. F. Broderick.)

Mr. McKEON.—The Court will take judicial notice of that?

The COURT.—Yes. Of course, if a barrel shrinks it will leak.

Mr. McKEON.—Has glue any effect upon the barrels when carrying cocoanut oil? A. Yes.

Q. What effect?

A. It closes the pores of the wood, and prevents the wood from absorbing oil, and the oil from going through the wood.

Mr. McKEON.—That is all.

Cross-examination.

Mr. BOLAND.—Q. Does it make any difference what character of glue is used—glue is a very broad term, you know.

A. The exact quality of glue is required for that purpose I am not familiar with.

Q. You don't know? A. No.

Testimony of P. J. Seale, for Libelant (In Rebuttal).

P. J. SEALE, called for the libelant in rebuttal, sworn.

Mr. McKEON.—Q. Mr. Seale, did you make an examination of the shipment of cocoanut oil or the barrels that came in on the "Korea Maru," consigned to Willits & Patterson, in August or September, 1917? A. I did.

The COURT.—What is his business?

Mr. McKEON.—Q. What is your business?

A. Cargo surveyor.

Q. How long have you been engaged as such?

(Testimony of P. J. Seale.)

A. Three and one-half years in San Francisco.

Q. Where prior to that?

A. In Vancouver, British Columbia. [117]

Q. In the same business? A. Yes.

Q. Were these barrels glued? A. Yes, inside.

Cross-examination.

Mr. BOLAND.—Q. What character of glue?

A. I could not say the character of the glue; it was hard on the inside of the barrel.

Testimony of W. E. Boyer, for Libelant (Recalled in Rebuttal).

W. E. BOYER, recalled for the libelant in rebuttal.

Q. Mr. Boyer, since your firm has been importing cocoanut oil in San Francisco, have you had any cocoanut oil coming in in good order and condition?

A. I have.

Q. In what kind of barrels did those shipments arrive?

A. The same kind as the "Korea" shipment.

Q. Could you recall some of the ships that carried cocoanut oil which was in good order and condition?

Mr. BOLAND.—Objected to as immaterial and incompetent.

The COURT.—Some witness testified that there was always leakage. The objection is overruled.

A. I can mention a few, the "Puake," the "Melville Dollar," and the "Dix." I have just those three.

Mr. McKEON.—Q. Are there any others whose

(Testimony of W. E. Boyer.)

names you cannot recall now?

A. I think there are; yes.

Mr. McKEON.—That is all.

Cross-examination.

Mr. BOLAND.—Q. Upon what months or during what time were those shipments which you mentioned carried?

A. The “Puake” transported it between October and January; the “Melville Dollar” between June 19 and July 31st; the “Dix” carried hers in October.

Q. What kind of a vessel is the “Puake”?

A. I think she was a motor ship.

Q. A motor ship?

A. I am not sure about that.

Q. Was it an on-deck shipment?

A. An on-deck shipment.

Q. The “Melville Dollar”; what kind of a boat is that?

A. That is a regular liner, as near as I remember.

Q. Was that an on-deck shipment, too?

A. I am not sure of that.

Q. The “Dix”?

A. I think the “Melville Dollar” was under deck, I am not positive; I will look it up. [118]

Q. And the “Dix”?

A. The “Dix” was a Government boat, I think.

Q. What kind of a boat is it?

A. That is a regular passenger boat, Government boat.

Mr. McKEON.—Q. A transport boat?

A. A transport boat.

(Testimony of W. E. Boyer.)

Mr. BOLAND.—Q. Where was the shipment on that? A. From Manila.

Q. Was it an on-deck shipment or under-deck shipment? A. The “Dix”?

Q. Yes. A. I am not positive of that.

Mr. McKEON.—I might say that the “Melville Dollar” and “Dix” were freighters, and it could not be on deck.

A. My best recollection is under deck, but I am not sure. I will look it up.

Testimony of P. W. Tompkins, for Libelant (In Rebuttal).

P. W. TOMPKINS, called for the libelant in rebuttal, sworn.

Mr. McKEON.—Q. Mr. Tompkins, what is your profession? A. Industrial chemist.

Q. How long have you been such?

A. Twenty-four years.

Q. Have you had any experience with cocoanut oil? A. Considerable.

Q. What effect has heat upon cocoanut oil?

A. It has various effects; one is expansion; it depends on the temperature that the cocoanut oil is subjected to.

Q. A greater temperature has a tendency—the higher the temperature gets the greater the tendency to expand?

A. The higher the temperature the greater the expansion, yes.

Cross-examination.

Mr. BOLAND.—Q. You are of the firm of Curtis

(Testimony of P. W. Tompkins.)

& Tompkins? A. I am.

Q. Did you examine the Martino Brand Tomato Paste? [119]

Mr. McKEON.—I object to that.

Mr. BOLAND.—I want the witness to qualify a little.

The COURT.—I sustain the objection.

A. I couldn't tell you anything about whether I did or not.

Mr. BOLAND.—Q. You don't know whether your firm examined any Martino Brand Tomato Paste for the Martino factory?

Mr. McKEON.—I object to that.

The COURT.—The objection is sustained.

Mr. BOLAND.—I am prepared to show, in explanation of my question, so that your Honor won't think I am captious, that the firm of Curtis & Tompkins examined Martino Tomato Paste and held that it was pure, and that it was condemned by the Government as being impure and improper, after examination and approval by Mr. Tompkins' firm.

The COURT.—That is his firm. He is the witness. I don't know how big his firm is.

Mr. BOLAND.—I don't know whether he did the work himself. It is merely going to the witness' qualifications. I know that to be a fact, because I know there were 100,000 cases condemned, of this paste, which came under his observation.

The WITNESS.—I might say, for your Honor's benefit, I did not understand what he referred to—that brand meant nothing to me, but during the sea-

son we examined possibly a dozen samples, of hundreds and hundreds that were turned out, and that the Government has gone over it in a more thorough way I understand, and found part of the shipment was not according to the standard; the inference to be gained, from the fact that we had passed it and the Government has not passed it, or condemned it, is very misleading in the fact that they have gone over a whole season, or a whole shipment, where we have only gone into a few individual samples. [120]

The COURT.—We are not trying that case now.

Mr. BOLAND.—That is all.

Mr. McKEON.—If your Honor desires any testimony from the witness as to the fact that shaft alley about which you inquired sometime ago does not go under No. 5 tank, Mr. Rudden is prepared to testify to that.

The COURT.—I take it for granted it does not, unless there is evidence it did.

Mr. McKEON.—That is the fact, it does not.

The COURT.—From the evidence I have heard, there has not been any attempt by anybody to show whether there would be a normal leakage or seepage.

Mr. BOLAND.—Yes, your Honor.

The COURT.—Is there anything in the depositions to that effect?

Mr. BOLAND.—One of the witnesses testified there was normal seepage.

The COURT.—But no witness has tried to estimate it.

Mr. BOLAND.—I will call Mr. Seale.

Testimony of P. J. Seale, for Claimant (Recalled).

P. J. SEALE, recalled for claimant.

Mr. BOLAND.—Q. Mr. Seale, is there normal leakage of cocoanut oil in liquid form in wood containers?

A. By “normal” you mean average leakage?

Q. Yes.

A. Well, there is, as a matter of statistics, I should say, possibly $\frac{1}{2}$ per cent or 1 per cent.

The COURT.—Does cocoanut oil all come from the same port?

Mr. BOLAND.—All that has been testified to-day came from Manila, but it does come from various ports in the Orient. [121]

The COURT.—Q. Would your answer of $\frac{1}{2}$ of 1 per cent or 1 per cent go to shipments from Manila?

A. In what month was this shipped?

Mr. McKEON.—It was in July, I think, that it left Manila.

The COURT.—Would your answer be the same, what would normally be expected?

A. It would, taking the year’s shipment, excluding any conditions which are abnormal.

Q. Your answer was $\frac{1}{2}$ of 1 per cent to 1 per cent? A. Yes.

Mr. BOLAND.—We have but the one witness, whom we are expecting, one of the officers of the liner, your Honor, who will testify as to the possibility of pumping or separating the oil.

Mr. McKEON.—My purpose in bringing out the fact that the soundings would have disclosed oil in

the bilges was to charge them with knowledge that No. 5 was leaking.

Mr. BOLAND.—I thought your purpose was to show that during the voyage we could have, instead of pumping it overboard, when the bilges were being pumped, saved it during the course of the voyage.

Mr. McKEON.—You would have taken some action to prevent the leakage.

Mr. BOLAND.—We propose to show by this witness we could not.

The COURT.—Do you dispute that?

Mr. McKEON.—It was possible to plug up No. 5 so that it would not leak at all.

The COURT.—That is another story.

Mr. McKEON.—This oil, as the depositions of the master and chief officer show, leaked out of the barrels in No. 5.

The COURT.—I understand that by putting the rod down in the bilges you claim it should have disclosed oil on the rod, [122] and they would know it was leaking?

Mr. McKEON.—Yes.

The COURT.—But counsel wants to show by this witness, who is coming, that if it gets into the bilges once there is no way to save it from the bilges. Do you dispute that?

Mr. McKEON.—I do not dispute the fact that when it once gets into the bilges that they could have recovered it from the bilges, but before it got into

(Testimony of J. G. Rudden.)

the bilges I maintain they could have prevented it from getting in there.

The COURT.—Does not that obviate the necessity of waiting for your witness? Counsel, as I understood, admits you could not have saved it after it was in the bilges.

Mr. BOLAND.—That will obviate that, but his contention now may necessitate some other witness to testify to the fact that there was no way of getting into No. 5 hold.

The COURT.—We will take a recess and you can confer with your principal.

(After a short recess the following proceedings were had:)

Mr. BOLAND.—After sending about town we have got the wrong man, I am sorry to say, Mr. McKeon is going to put on Mr. Rudden.

Mr. McKEON.—Mr. Boland is going to call someone on the ship who will testify according to his views, and rather than keep this witness here or call him at some other time, I will call Mr. Rudden now in anticipation of that evidence, and I might say rather than trouble the Court with it we could probably take it on reference.

Mr. BOLAND.—That will be quite satisfactory.
[123]

Testimony of J. G. Rudden, for Libelant (Recalled).

J. G. RUDDEN, recalled for the libelant.

Mr. McKEON.—Q. Mr. Rudden, you have already testified that by placing a rod in the bilges

(Testimony of J. G. Rudden.)

and looking at it, it would have been possible to find the oil, if there was any in the bilges? A. Yes.

Q. Following that up further, with knowledge of the fact that oil was in the bilges, and that the ship was carrying oil in barrels, would you, if you were chief officer of the "Korea Maru," attempt to ascertain where the oil was leaking from, and if so, would you attempt to reclaim whatever oil was leaking or seeping?

Mr. BOLAND.—I object to the question as assuming a state of mind on the part of the witness that does not necessarily exist in other persons on board the ship; it is the facts we want, rather than what this witness might or might not have done.

The COURT.—I will overrule the objection. It is proper to get at it in some form.

Mr. McKEON.—You may answer the question.

A. For the benefit of the company, I would save the oil, by taking up these manhole plates in the bilge and bail it out; these manhole plates are big enough for a man to get through and clean them out.

Q. Would it be possible, assuming that the oil was coming out of No. 5 tank, to have stopped the oil from getting out of that tank?

A. Yes, you could put a wooden plug in the pipe leading from the tank and plug it up.

Q. If you knew that oil was coming out of that tank, leaking out of that tank, would you, as a practical matter, in furtherance of your duty in the care and custody of the cargo, entrusted [124]

(Testimony of J. G. Rudden.)

with the ship's care, plug it up that way?

A. Yes, provided there was no general merchandise in that tank.

Q. Provided there was no general merchandise in that tank?

A. Yes, as long as I knew the tank was a solid mass of oil, I would plug it up.

Q. That is possible on the "Korea Maru"?

A. It is possible.

Mr. McKEON.—That is all.

Cross-examination.

Mr. BOLAND.—Q. You recall, do you, from your experience with the "Korea Maru," where the bilges are?

A. They were athwartships, but as to the number of that bilge I don't know, which leads from No. 5 tank—the number of that bilge I don't know.

Q. Has No. 5 tank a separate bilge for itself, or a bilge in connection with other holds?

A. To the best of my recollection, there is a separate bilge.

Q. A separate bilge for No. 5 tank? A. Yes.

Q. Is there a lead-pipe from No. 5 tank to its separate bilge, or does it merely go down to the skin of the ship?

A. It goes down to the skin of the ship, both port and starboard sides.

Q. To its bilge? A. To the bilge.

Q. You said something about bailing. There is, I gather from your remarks, a manhole from the

(Testimony of J. G. Rudden.)

engine-room into the bilge which belongs to No. 5 tank?

A. Yes, there is a manhole plate on the port and starboard side.

Q. That is located in the engine-room, is it?

A. Located in the engine-room.

Q. Whereabouts in the engine-room?

A. In the wings.

Q. In one of the wings of the engine-room?

A. Yes—let me see. I won't say whether it is in the wings, or amidships. [125] I think it is in the wings.

Q. How deep from the floor of the engine-room is the bilge for No. 5 tank?

A. To the best of my recollection it is about three feet.

Q. Your idea is, then, that men could be detailed to take pails, open the manhole plate, reach down with the bucket, fill the bucket with cocoanut oil and carry it somewhere? A. Carry it somewhere.

Q. Where would they carry it?

A. They would carry it on deck.

Q. Where would they carry it?

A. They would carry it on deck.

Q. Where would they put it on deck?

A. I don't know where they would put it on deck; in barrels or something; they have a lot of empty barrels.

Q. Where are the empty barrels?

A. That they generally use to carry oil for the engines in.

(Testimony of J. G. Rudden.)

Q. You are assuming that there might be some barrels on board? A. Yes.

Q. If there were no barrels, where would they put it?

A. They could put it in one of the tanks.

Q. What tanks?

A. Into some of the double bottoms.

Q. What tanks? A. Double bottoms.

Q. Where are they?

A. Underneath the engine-room.

Q. How could they get it in there?

A. Take off the manhole plate.

Q. Aren't those also bilges?

A. No, those are tanks.

Q. What are they filled with?

A. They are mostly empty, except what they use for fresh water for the boilers.

Q. Would there be a strong likelihood of mixing the oil with the water for the boilers?

A. No, these tanks are too clean, and they are dry, especially in the engine-room.

Q. You think they could dip it from one bilge and place it in [126] another bilge?

A. Yes; they have a hand-pump on that ship, too, to the best of my recollection; they could pump it out.

Q. That all assumes, does it not, that they could stop the pumping of the bilge—they would not have to pump that bilge belonging to 5 tank on the voyage—they would not have to pump that?

A. They would not have to pump it, no.

(Testimony of J. G. Rudden.)

Q. There is some testimony here that they did pump that bilge. Why did they pump it?

A. I don't know.

Q. But assuming that they did, they would pump the oil overboard with the water?

A. If there was any water in the bilge, they would pump it overboard.

Q. And your idea would have been, instead of pumping it, to have taken that manhole off and dumped it into some other tank in the engine-room, provided there was another tank there empty?

A. Yes; those tanks are all empty there.

Q. They are all empty?

A. Some of them; some are full of feed water for the boilers.

Q. Who ordinarily does the sounding of the bilges on board?

A. The sounding of the bilges on the decks is done by the ship's carpenter; the sounding of the bilges in the engine-room is done by the engineers.

Q. Assuming that the engineers did not know what cargo was in the various holds, and that when they sounded they did not pay any attention to what was on the sounding rod?

A. The engineer on watch that sounds the bilge is supposed to put it in the log; the chief engineer notes that log, and if he finds anything wrong he immediately gets in touch with the master of the vessel and reports conditions.

Q. But I am assuming that he does not pay any attention to what is on the rod, except that there

(Testimony of J. G. Rudden.)

is a certain amount of [127] liquid in the bottom.

A. Then it is carelessness on his part not to report it.

Q. Not to report it? A. Yes.

Q. Suppose he does not pay any attention?

A. Then he is a poor engineer.

Q. Now, I understood you to say that this leakage in No. 5 tank would go down to the skin of the ship? A. Go through a pipe.

Q. Through a pipe? A. Yes.

Q. Go to the skin of the ship; and how, then, is it gathered into a pipe?

A. In the tank, in the after part, there is what they call a scupper, a strainer—you did not see it that day you were down there—as any water or oil gets in that tank it will run down through those pipes into the bilges; the bilges are independent of the double bottoms.

Q. There is a separate bilge for each one?

A. Yes.

Q. Could any one crawl into this bilge and plug up the pipe?

A. He could after they got some of it out; it would not be leaking down in torrents all at once; it would not leak out of the barrels all at once.

Mr. McKEON.—It is possible to plug up these pipes before it gets into the bilges? A. Yes.

Mr. McKEON.—If I may refer the Court to an answer to an interrogatory, in answer as to a question as to what became of the oil, there is this: “If any escaped it went into the scuppers and thence

(Testimony of J. G. Rudden.)

into barrels.” I would like to know what those barrels are.

It is also the fact that this company, long after this cargo was delivered and discharged here, I think on the next voyage or thereabouts, tendered us a quantity of this oil as having been reclaimed from the ship. That is a fact, Mr. Chapin, is it not? [128]

Mr. CHAPIN.—Yes, presumably coming from the ship.

Mr. McKEON.—We only took your statement for it.

Mr. CHAPIN.—We have not any definite information as to that.

Mr. BOLAND.—There is one matter that Mr. McKeon just spoke of; it says, “If any escaped, it went into the scuppers, and thence into barrels.” I prepared these answers to the interrogatories, and the word “barrels” is evidently a typographical error; it should be “bilges.”

Mr. McKEON.—You want to change that?

Mr. BOLAND.—Yes.

Mr. McKEON.—If your Honor please, with respect to the suggestion that Mr. Boland made as to the libel, the Circuit Court of Appeals of this Circuit has held in these cases it makes no difference as to any allegation that you may make of negligence, breach of contract in not delivering the cargo in the same order as when delivered to it. That decision was the California Door Company against someone, either in the 204 or 205 Federal;

but, to avoid any discussion on that, I ask leave to strike out of the libel the words appearing on line 25, at page 3: "by said heat to liquefy and," and the allegation will then read, "That by reason of said improper stowage and said negligent care of said cargo, said oil was caused to escape from the barrels."

Mr. BOLAND.—I must object to the amendment, with all due deference to counsel, and wishing to extend every courtesy, because the case prepared upon the allegation of the libel, as your Honor has seen, from the character of the testimony which I brought out, and the allegation is it was caused to liquefy, and for that reason escaped from the barrels; that is the essential allegation which I prepared to meet in the [129] case, and that is the only allegation I prepared to meet, and consequently to emasculate the libel in that way changes the theory of the case; therefore, I must object to the amendment at this time.

The COURT.—As long as there is going to be a reference for one purpose, the amendment will be allowed. If you have been taken by surprise in that particular, you can bring in other evidence.

Mr. McKEON.—Of course, it has been stipulated long since that the oil was in liquid form when delivered to the ship. Now, how that can have any effect upon Mr. Boland's present contention, I don't know; in addition to that, it is not necessary, in cases of this kind, to allege anything except the shipment in apparent good order and condition—

The COURT.—I have allowed the amendment.

Mr. McKEON.—It may be deemed as amended without filing a formal amendment?

Mr. BOLAND.—Subject to my exception to the Court's order.

The COURT.—The exception is allowed.

Mr. McKEON.—You want to take the rest of the testimony on reference?

Mr. BOLAND.—Yes.

Mr. McKEON.—I will reserve, if I may, the opportunity of taking one more witness, who has not come to-day.

Mr. BLAND.—Very well.

[Endorsed]: Filed Apr. 25, 1919. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [130]

In the Southern Division of the United States District Court in and for the Northern Division of California, First Division.

IN ADMIRALTY—No. 16,302.

CHARLES D. WILLITS, and I. L. PATTERSON, Copartners Doing Business Under the Firm Name of WILLITS and PATTERSON,

Libelants,

vs.

The Japanese Steamship "KOREA MARU," Her Engines, Boilers, Boats, Tackle, Apparel and Furniture,

Respondent.

TOYO KISEN KAISHA, a Corporation,

Claimant.

Friday, June 14, 1918.

**Deposition of U. Kondo, Taken De Bene Esse on the
Part of the Claimant, Before John E. Manders,
a Notary Public in and for the City and County
of San Francisco, State of California. [131]**

In the Southern Division of the United States Dis-
trict Court in and for the Northern District of
California, First Division.

IN ADMIRALTY—No. 16,302.

**CHARLES D. WILLITS, and I. L. PATTER-
SON, Copartners, Doing Business Under the
Firm Name of WILLITS and PATTER-
SON,**

Libelants,

vs.

**The Japanese Steamship "KOREA MARU," Her
Engines, Boilers, Boats, Tackle, Apparel and
Furniture,**

Respondent.

Notice of Taking Deposition De Bene Esse.

To Libelants Above Named and to Messrs. Mc-
Cutchen, Olney and Willard and Ira A. Camp-
bell, Their Proctors:

You and each of you will please take notice that
on Friday, the 14th day of June, 1918, at the hour
of three o'clock in the afternoon thereof, at the
office of the undersigned, 1306 Hobart Building,
No. 582 Market Street, in the City and County of

San Francisco, State of California, claimant herein will take the deposition *de bene esse* of U. Kondo, captain of the Japanese steamship "Persia Maru," a witness to be called on behalf of claimant, who is about to depart from said City and County and from the United States bound on a voyage to sea, before John E. Manders, Notary Public, in and for the City and County of San Francisco, State of California. [132]

Dated, San Francisco, California, June 13, 1918.

SAMUEL KNIGHT,

Proctor for Claimant.

[Endorsed]: Receipt of a copy of the within notice of taking deposition *de bene esse* is hereby admitted this 13th day of June, 1918.

McCUTCHEN, OLNEY & WILLARD,

J. D. L.

Proctors for Libelants. [133]

In the Southern Division of the United States District Court, in and for the Northern District of California, First Division.

IN ADMIRALTY.—No. 16,302.

CHARLES D. WILLITS, and I. L. PATTERSON, Copartners, Doing Business Under the Firm Name of WILLITS and PATTERSON.

Libelants,

vs.

The Japanese Steamship "KOREA MARU," Her Engines, Boilers, Boats, Tackle, Apparel and Furniture,

Respondent.

TOYO KISEN KAISHA, a Corporation,
Claimant.

Deposition of U. Kondo, for Claimant.

BE IT REMEMBERED, that on Friday, the 14th day of June, 1918, pursuant to the notice of taking deposition hereto annexed, at the office of Samuel Knight, Esq., Proctor for the Claimant, in the above-entitled action, Room 1306 in the Hobart Building, No. 582 Market Street, in the City and County of San Francisco, State of California, personally appeared before me, John E. Manders, a notary public in and for the City and County of San Francisco, State of California, duly commissioned and sworn and authorized to administer oaths, etc., U. Kondo, a witness on behalf of the claimant in the above-entitled matter.

Samuel Knight, Esq., appeared as proctor for the [134] claimant, and Joseph P. McKeon, Esq., appeared as proctor for the libelants.

And the said witness having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the cause aforesaid, did thereupon depose and say in answer to interrogatories put to him by the proctors for the parties respectively, as is hereinafter fully set forth:

Mr. KNIGHT.—May it be understood, Mr. McKeon, that the testimony of this witness need not be signed, and that it may be taken in shorthand under the usual stipulation?

Mr. McKEON.—Yes.

U. KONDO, a witness produced on behalf of the claimant, was duly sworn, through the interpreter, to testify the truth, the whole truth, and nothing but the truth, and upon examination through the Interpreter, testified as follows:

Direct Examination.

Mr. KNIGHT.—Q. Captain Kondo, you are the master of the steamship “Persia Maru,” are you not? A. Yes, I am the captain.

Q. And you are about to leave this port, bound for the Orient, to-morrow?

A. Yes, I am expecting to leave here to-morrow.

Q. Will you state whether or not you were the first officer of [135] the “Korea Maru,” on her homeward voyage No. 4? A. I was; yes.

(Deposition of U. Kondo.)

Q. Were you the first officer of that vessel on and about the 7th of July, 1917, when the vessel was at Manila, Philippine Islands?

A. Yes, sir; I was there on board.

Q. State, Captain, whether or not, as first officer, you had anything to do with the loading of the steamship at Manila, in July, 1917?

A. Yes, sir; I was in charge of that duty.

Q. Do you recall taking on board of the steamer at Manila a certain quantity of cocoanut oil, consigned to Willits and Patterson, of this city?

A. I remember it.

Q. Was there any other cocoanut oil stowed on that vessel just prior to her homeward voyage No. 4, at Manila, other than the cocoanut oil consigned to Willits and Patterson—on that voyage, I mean?

A. Unless I look up my memorandum, I can't say as to that question.

Mr. KNIGHT.—There were 542 barrels of this cocoanut oil, were there not?

Mr. McKEON.—Yes.

Mr. KNIGHT.—Q. Referring particularly to the 542 barrels of cocoanut oil said to have been shipped by the steamer "Korea Maru" from Manila to San Francisco, on that particular voyage, I ask you where that oil was stowed?

A. It was stowed in two holds. Part of it was stowed in hold No. 5, and the remainder in hold No. 7.

Q. Can you identify on this photographic copy of what purports [136] to be the cargo space of

(Deposition of U. Kondo.)

the "Korea Maru" where the two holds are in which you say this cocoanut oil was stowed?

A. Yes, I can point it out.

Q. Please do so. I am referring to the paper headed "Korea & Siberia." A. Yes.

Mr. KNIGHT.—The witness shades the portion of the hold to which he refers, and also shades a portion of the after part of the ship which is enclosed in a rectangle marked "294 tons," the No. 7 hold, the first portion shaded being the No. 5 hold.

Q. Do you know, Captain, how many tons of the cocoanut oil referred to were stowed in the No. 5 hold?

A. I can't give you the exact tonnage of cocoanut oil stowed in that hold, but I can give you the exact figure as soon as I look over my memorandum.

But at any rate, that space was filled up with nothing but cocoanut oil.

Mr. KNIGHT.—The witness referred to the No. 5 hold.

Q. In how many tiers was the cocoanut oil in the No. 5 hold stowed? A. Three tiers only.

Q. Did three tiers completely fill that part of the hold? A. Yes, sir.

Q. How was that dunnaged, if at all?

A. A very good dunnage was given for each and every tier.

Q. Captain, can you describe further than that how each tier was dunnaged?

Mr. McKEON.—I move to strike out the last an-

(Deposition of U. Kondo.)

swer as being the [137] conclusion of the witness and not responsive.

Mr. KNIGHT.—Q. Captain, we will have to get your oral testimony upon that.

A. A first very heavy dunnage was placed on the floor of the hold. Then the barrels of cocoanut oil were placed, and then above that more wood for dunnage. In other words, wood dunnages were placed on each and every tier of the cocoanut barrels.

Q. Was there any dunnage placed at the end of the tiers?

A. What do you mean by “the end of the tiers”?

Q. Was there any dunnage placed there except the dunnage between the tiers? Was there any dunnage placed at the end of any of the barrels to keep them from slipping?

A. Dunnage was placed on both ends of the barrels, so the weight would not be altogether on the center part of the barrels.

Q. At both ends of the barrels?

A. Yes, sir, at both ends of the barrels.

Q. Was there any cargo placed on the cocoanut oil in that No. 5 hold?

A. No cargo was taken in that hold other than the cocoanut oil.

Q. In how many tiers was the cocoanut oil stored in the No. 7 hold? A. One tier only.

Q. Was that dunnaged?

A. Proper dunnage was given it.

Q. How was it dunnaged? Please describe, Cap-

(Deposition of U. Kondo.)

tain, a little more fully as to that.

A. Contrary to the way the cocoanut oil barrels were stowed in the No. 5 hold, in the No. 7 hold the barrels were set on end and dunnage was placed on them [138] that was to take other cargo.

Q. Was the cocoanut oil in No. 5 hold—were the barrels of cocoanut oil in No. 5 hold resting on their sides?

A. Yes, sir, on their sides in hold No. 5.

Q. Was any dunnage placed on the sides of any of the barrels in No. 7 hatch?

A. Yes, so that those barrels would not move when the ship rolled, wooden dunnage was given, and also other cargo was placed, so the barrels would not move.

Q. What other cargo was placed on the cocoanut oil in the No. 7 hatch?

A. General merchandise.

Q. Did you see the cocoanut oil before it was taken on board of the vessel?

A. Yes, sir—I saw the barrels.

Q. On the wharf at Manila?

A. I saw some of them on a barge alongside the ship.

Q. Did you see all of the barrels of cocoanut oil before they were taken on board of the steamer?

A. Yes, sir, I saw all of them.

Q. What was the condition of the barrels as you observed them at that time?

A. The barrels were all stained with oil.

Q. The barrels were all stained with oil?

(Deposition of U. Kondo.)

A. Yes, sir.

Q. Could you tell from the appearance of the barrels then whether they were new or old?

A. It looked as though the barrels were all old barrels, although they were stained and you could not describe it very well.

Q. Could you tell from the appearance of the barrels whether or not they had been painted?

A. My best recollection is some [139] of the barrels were painted with paint—I don't remember whether all of them were painted or just some of them.

Q. In what manner were they taken on board of the vessel?

A. We took them into the ship by means of a winch.

Q. And were they taken with a net or with rope?

A. Most of them were taken in by means of a net, but there were a few which were taken in by means of ropes.

Q. Captain, how was the No. 5 tank ventilated, if at all?

A. There were two ventilators in hatch No. 5, to give air in circulation.

Q. Where did those ventilators start, and where did they end?

A. The end of the ventilator is in the thrust recess, and the top of the ventilator is at the promenade deck.

Q. Both open to the air?

A. Yes, sir, open to the air.

(Deposition of U. Kondo.)

Q. What kind of a top has each of those ventilators? A. A mushroom cover.

Q. What kind of a cover is that?

A. It is known as a mushroom on the ship—it is a round cover.

Q. Like a chimney?

A. I don't see any cover to a chimney.

Q. What is the object of a mushroom top?

A. There are several reasons, but the main reasons are that the air can come in from any direction, and also air can go through from the bottom. Another purpose is to prevent rain water from coming in.

Q. How does the air circulate in those ventilators? Does it go from the thrust recess to the promenade deck, or from the [140] promenade deck to the thrust recess?

A. That largely depends upon the condition of the atmosphere. Sometimes the cold air might go through from the shaft alley, and sometimes the cool air from outside would come in from the top.

Q. It depends on atmospheric conditions, does it?

A. Yes, movements of winds, and climatic conditions otherwise.

Q. Has the movement of the ship anything to do with it?

Mr. McKEON.—That is objected to as leading and suggestive.

A. Yes. There is some variation to it. In case of a head wind, the cold air often comes in.

Q. Does the air, through either of those ventila-

(Deposition of U. Kondo.)

tors, get into the No. 5 hatch?

A. Yes, sir, the doors of both ventilators are always open, and cold air always comes in.

Q. Then there is a door in each of those ventilators opening into the No. 5 hatch, is there?

A. Yes, sir.

Q. Will you state, Captain, what is contained on each side of the No. 5 hatch?

A. Both sides of hatch No. 5 are fresh-water tanks.

Q. Are those the main fresh-water tanks of the vessel, or are those tanks supplied from some other part of the vessel with fresh water?

A. There are other fresh-water tanks on the ship that supply the fresh water to these two tanks on the sides of hatch No. 5.

Q. Is the water fresh water for the ship's use—is that fresh water drawn from these tanks on each side of the No. 5 hatch?

A. Yes, it is always fresh water. [141]

Q. Have you any cold-storage tank on the vessel?

A. On the top of hold No. 5 there is an ice chamber.

Q. An ice chamber? A. Yes, sir.

Q. And what is contained and what was on that ship contained in that ice chamber?

A. In the ice chamber there is contained meats and vegetables, and we always freeze them with plenty of ice.

Q. What was the vessel drawing when loaded at Manila, just prior to her voyage home?

(Deposition of U. Kondo.)

A. My best recollection is about 27 feet aft.

Q. And where would that bring the water with reference to tank No. 5?

A. At least over and above one-half of tank No. 5.

Q. How was the temperature on that voyage 4 homeward?

A. It was the hottest weather and the hottest voyage of the year.

Q. Will you state whether or not that cocoanut oil was in liquid form at the time it was taken on board at Manila?

A. It was in liquid form.

Mr. KNIGHT.—I think that is all.

Cross-examination.

Mr. McKEON.—Q. Did you examine the cocoanut oil to ascertain whether it was in liquid form at Manila?

A. Do you mean by taking liquid cocoanut oil outside of the barrel?

Q. How do you know it was in liquid form?

A. I noticed that some of the barrels were leaking, and you can't expect to have cocoanut oil in solid form at that season. [142]

Q. That is the only reason that you know it?

A. And also I noticed that the liquid cocoanut oil perforated through the wood of the barrels.

Q. That is a pretty hot season, isn't it?

A. Yes, sir. It was hot.

Q. Usually at that time of the year it is hot, is it not? A. Yes, sir, it is hot.

(Deposition of U. Kondo.)

Q. Cocoanut oil is a cargo that requires a cool space, does it not?

A. A cooler space is better.

Q. Particularly so in hot weather?

A. Yes, it is.

Q. Captain, in the place that you have been referring to as the No. 5 hold, where the cocoanut oil was stowed, that is a tank, is it not?

A. You may call it a tank, but, according to the ship's construction, it is not a tank.

Q. What is it?

A. It is an ordinary hold.

Q. The fresh-water tanks that you speak of, are they on top of that No. 5 tank where the oil was, or are they parallel with it on the orlop deck?

A. The fresh-water tanks are on the sides of that hold.

Q. They are exactly the same sort of tanks as the No. 5 hold, are they not?

A. They are of different shape.

Q. Constructed of the same material?

A. It may be the same material, but different shapes.

Q. How much space does that No. 5 compartment take up in the No. 5 hold—one-third of it or one-half of it, or three-quarters of it, or how much?

A. About one-quarter [143] of it or a little smaller.

Q. On top of the No. 5 tank where the oil was stowed, did you have any hatch boards?

A. Yes, sir, there were hatch boards.

(Deposition of U. Kondo.)

Q. And on top of those hatch boards, what did you have?

A. When there is any cargo, we put cargo on them.

Q. You had cargo there this time, did you not?

A. Yes, there was a cargo.

Q. And you had cargo to the ceiling of the next compartment, did you not?

A. There was about one foot of space between the ceiling and the top of the cargo.

Q. And that cargo compartment is about eight feet high, isn't it?

A. On the beam, about 7 feet.

Q. From the beam to the top of the No. 5 tank is 7 feet? A. Yes, sir, 7 feet.

Q. No. 5 tank rests on the orlop deck, does it not?

A. In this particular steamer there was made a recess underneath this tank, and for that reason you might call it the orlop-deck, but we call it the hold.

Q. The cold-storage compartment that you speak of was not right on top of the No. 5 tank, was it?

Mr. McKEON.—By the way, are you going to put this photographic copy that you referred to in evidence?

Mr. KNIGHT.—Yes, I will identify that in evidence.

Mr. McKEON.—Then my last question may be stricken out.

Q. This drawing here correctly shows the cold-

(Deposition of U. Kondo.)

storage plant as [144] it relates to the No. 5 tank, does it not? A. Yes, sir.

Q. The thrust recess below No. 5 tank opens right into the engine-room there, does it not?

A. Yes, there is a door.

Mr. McKEON.—Repeat that question to him, Mr. Interpreter.

A. (After question repeated by the interpreter.) Usually it is open.

Q. And you say the ventilator that goes through the No. 5 compartment opens in through this thrust recess?

A. It is open in the after part of the recess.

Q. In the after part of the thrust recess, this ventilator opens? A. Yes, sir.

Q. And that apparently is sketched on here now?

A. Yes, sir.

Mr. KNIGHT.—The captain sketched that himself.

Mr. McKEON.—Q. Did you sketch that?

A. Yes, sir. But of course there is a little difference in the drawing.

Q. That goes right down into the thrust recess?

A. Yes, sir.

Q. This No. 5 compartment is directly abaft the engine-room, is it not? A. Yes, sir.

Q. And the thrust recess is directly under the No. 5 tank? A. Yes, under hold No. 5.

Q. The engine-room is a pretty hot place, Captain, is it not?

(Deposition of U. Kondo.)

A. In comparing with these other compartments, the engine-room is hot.

Q. Captain, this drawing here that has been referred to as [145] "Korea & Siberia" represents the stowage plan of the vessel, does it not, and represents the stowage plan upon this particular voyage 4? A. It only states the spaces.

Q. Yes, but with reference to the places to put stores, etc., it is all true—here where it refers to the stores, that means the ship's stores, does it not?

A. That refers to the engine-room stores.

Q. The water line of No. 5 tank and No. 7 lower hold are just the same, are they not?

A. I think on the outside it is about the same.

Q. You said the ship was drawing 27 feet aft.

A. Somewhere near 26 or 27.

Q. Was she loaded astern? Was she deeper aft than she was forward? A. Yes, sir.

Q. Then No. 7 hold would be down deeper in the water than No. 5 tank, wouldn't it?

A. Perhaps a little bit.

Q. Were you on the ship on voyage 4? Did you come to San Francisco with the ship?

A. Yes, sir, I came with her.

Q. You sketched this ventilator running down here in the forward part of the No. 5 hold, Captain. You have already testified to that.

A. Yes, sir.

Q. Is that the well—and that the skylight?

A. It is a little different shape from that.

Q. This is the skylight, isn't it?

(Deposition of U. Kondo.)

A. The skylight, and this here—it is about the same height (indicating).

Mr. KNIGHT.—Continue the sketch that you have drawn on up, [146] then.

A. It is about the same height as this skylight. (The witness draws in illustration.)

Mr. McKEON.—Q. What other ventilator did you have in the No. 5 hold there?

A. One on the upper deck.

Q. Where did that pass through No. 5 tank? Over here—if it did at all? (Indicating.)

A. About here (showing).

Q. Will you draw a line, showing where the other ventilator went through.

A. There it is right there (showing).

Q. Then there were two ventilators in the No. 5 hold? A. One on each side.

Q. Starboard and port?

A. Port and starboard, two in this after part of the No. 5, and two here where I have drawn that, one on each side on the after part and one on each side on the forward part.

Q. And they opened into the thrust recess, as they passed through the No. 5 tank?

A. There is no connection there (showing).

Q. There is no connection with the after ventilator, but the forward ventilator that went through No. 5 opened into the thrust recess?

A. What I mean is this: one ventilator that goes through hold No. 5—

Q. (Interrupting.) No. 5 tank.

(Deposition of U. Kondo.)

A. (Continuing.) —hold No. 5 goes through the thrust recess.

Q. This whole thing is hold No. 5?

A. Yes, and when that goes through this tank, it goes through the thrust recess. [147]

Q. Captain, is the No. 7 hold, where this oil was stowed, a cooler compartment than the No. 5 tank?

A. There is no particular difference as to the temperature.

Q. There is not? A. No, sir.

Q. Is it hotter in the engine-room, Captain, than it is in the No. 7 hold?

A. Inside of the engine-room is much warmer than No. 7.

Q. Captain, is there any opening into the No. 5 tank at all, except on top? Is that completely enclosed?

A. No, there is no other opening except the one on the top.

Q. Then you would say it is completely enclosed?

A. Yes, sir.

Q. What was the tank constructed of?

A. Steel.

Q. Captain, what is the hottest place aboard your ship? A. The boiler-room.

Q. And how do you separate the boiler-room from your cargo apartments?

A. What do you mean by that?

Q. You put bunkers in there, do you not—bunker coal. A. The bunkers are in front.

Q. And bunkers after, too, aren't there, and

(Deposition of U. Kondo.)

bunkers on top as well? A. Yes, sir.

Q. Bunkers all surrounding it— .

Mr. McKEON.—I think that's all.

Mr. KNIGHT.—One further question.

Redirect Examination.

Mr. KNIGHT.—Q. Captain, do the ventilators which go through the forward part of the No. 5 tank also pass through the cold storage room?

A. Yes. [148]

Q. Is there any opening from those ventilators into the cold-storage room?

A. Yes, sir, there is a door in the cold-storage room.

Q. Leading into the ventilators?

A. Just outside of the cold-storage room.

Q. Does the ventilator get any of the air from the cold-storage room.

A. The air does not directly go through, but the cold air is always surrounding that portion of the ventilator.

Recross-examination.

Mr. McKEON.—Q. Captain, this after ventilator that you have just been testifying to in the after part of the No. 5 hatch, that does not feed the No. 5 tank at all, does it?

A. The cold air that comes through this after ventilator always cools the side of hold No. 5—there is good ventilation down here at the side of hold No. 5.

Q. Captain, this cool air that you think goes in

(Deposition of U. Kondo.)

through this after ventilator, passing along through the cargo space there, this cargo compartment, does that help to cool the after end of the No. 5 tank?

A. The main purpose is to give good ventilation for this space, the whole space.

Q. And you think, Captain, that that cools this steel after end of the No. 5 tank?

A. Yes, sir, it always cools it.

Q. It always does? A. Yes, sir.

Mr. McKEON.—That is all. I understand that this photographic copy is to be attached to the deposition of the witness.

Mr. KNIGHT.—I would like to use it with other witnesses. [149] It may be identified by the reporter and then produced at the trial upon that identification.

Mr. McKEON.—Very well.

Mr. KNIGHT.—Then it is agreed that the map may be filed at any time afterwards, as it is merely a copy of the blue-print now on file.

Mr. McKEON.—Yes.

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

I, John E. Manders, a notary public in and for the City and County of San Francisco, State of California, duly commissioned and sworn and authorized to administer oaths, do hereby certify that U. Kondo, the witness in the foregoing deposition named, was by me, prior to the giving of his said deposition, duly sworn to testify the truth, the

whole truth, and nothing but the truth; that the said deposition was taken at the time and place mentioned in the annexed notice of taking deposition, to wit, at the office of Samuel Knight, Room 1306 in the Hobart Building, No. 582 Market Street, in the City and County of San Francisco, State of California and on Friday, the 14th day of June, 1918, at the hour of 3:00 o'clock in the afternoon thereof, and that the said deposition was entirely completed upon the said day; and I further certify that, after said deposition was taken by me as [150] aforesaid, the reading over and signing thereof by the witness having been specifically waived by stipulation of counsel, as appears in the foregoing transcript of said deposition, it has been retained by me until now I return the same to the court for which it was taken.

IN WITNESS WHEREOF, I have subscribed my name and affixed my seal of office at my office in the City and County of San Francisco, this 22d day of June, 1918.

[Seal] JOHN E. MANDERS,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Mar. 26, 1919. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk.
[151]

In the District Court of the United States in and for the Southern Division of the Northern District of California.

IN ADMIRALTY—No. 16,302.

CHARLES D. WILLITS and I. L. PATTERSON, Copartners, Doing Business Under the Firm Name of WILLITS & PATTERSON,
Libelants,

vs.

The Japanese Steamship, "KOREA MARU," Her Engines, Boilers, Boats, Tackle, Apparel and Furniture,

Respondent.

(Deposition of George C. Arnold, Taken on Behalf of Libelants.)

BE IT REMEMBERED that on Thursday, October 31, 1918, pursuant to stipulated of counsel hereunto annexed, at the offices of Messrs. McCutchen, Olney & Willard, in the Merchants Exchange Building, in the City and County of San Francisco, State of California, personally appeared before me, Francis Krull, a United States Commissioner for the Northern District of California, authorized to take acknowledgments of bail and affidavits, etc., George C. Arnold, a witness called on behalf of the libelant.

Joseph McKeon, Esq. (for Messrs, McCutchen, Olney & Willard), appeared as proctor for the libelant, and Samuel Knight, Esq., and F. E.

Boland, Esq., appeared as proctors for the respondent, and the said witness having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the cause aforesaid, did thereupon depose and say as is hereafter set forth.

(It is hereby stipulated and agreed by and between the proctors for the respective parties that the deposition of the [152] above-named witness may be taken *de bene esse* on behalf of the libellant at the offices of Messrs. McCutchen, Olney & Willard, in the Merchants Exchange Building, in the City and County of San Francisco, State of California, on Thursday, October 31, 1918, before Francis Krull, a United States Commissioner for the Northern District of California and in shorthand by Charles R. Gagan.

It is further stipulated that the deposition, when written up, may be read in evidence by either party on the trial of the cause; that all questions as to the notice of the time and place of taking the same are waived, and that all objections as to the form of the questions are waived, unless objected to at the time of taking said deposition, and that all objections as to materiality and competency of the testimony are reserved to all parties.

It is further stipulated that the reading over of the testimony to the witness and the signing thereof are hereby expressly waived. [153]

Deposition of George C. Arnold, for Libelants.

GEORGE C. ARNOLD, called for the libelants, sworn.

Mr. McKEON.—Q. What is your name and residence?

A. George C. Arnold; Manila.

Q. Were you in Manila on or about the 7th day of July, 1917? A. Yes, sir.

Q. Do you remember a shipment of cocoanut oil on board the steamer “Korea” on or about that time? A. Yes, sir.

Q. What was your connection with Willits & Patterson at that time?

A. I was manager of the Willits & Patterson house in Manila.

Q. Prior to the shipment of that oil on board the “Korea Maru” did you have occasion to see that cocoanut oil in barrels?

A. Yes, I saw the oil in the warehouse before it was loaded into the ship at Manila.

Q. Will you describe the warehouse that that cocoanut oil was in?

A. It was a warehouse with a stone floor, thick stone walls, and a tile roof.

Q. Did you go into that warehouse and examine the barrels of oil prior to shipment? A. Yes, sir.

Q. What was the condition of those barrels with respect to whether they were new or old?

A. They were new barrels.

Q. Did you find any of the barrels leaking?

A. No.

(Deposition of George C. Arnold.)

Q. Did you find any of the barrels stained?

A. No, I don't think so, any more than they would be stained from filling or from being transferred from the lighters into the warehouse.

Q. By that you mean that you did not see any evidence of stain from oil on the barrels leaking out? A. No, I did not.

Q. Was there anyone else in the warehouse examining these barrels at that time that you saw?

A. No one except the cooper [154] who was employed there.

Q. What was the cooper doing?

A. He was tightening hoops.

A. Going over each barrel, examining it?

A. Yes; that was his duty, to examine every barrel; it is customary to re-cooper barrels after they have been handled.

Mr. BOLAND.—I move to strike out the latter portion of the answer as not responsive to any question and as a volunteer statement, and immaterial, irrelevant and incompetent.

Mr. McKEON.—Q. In your judgment, Mr. Arnold, from what you saw, were those barrels in good order and condition?

A. They were.

Cross-examination.

Mr. BOLAND.—Q. Did you take the temperature of this warehouse? A. No, sir.

Q. How were the barrels piled?

A. Mostly on bilges; some of them were on end.

Q. Were they piled in tiers?

(Deposition of George C. Arnold.)

A. They were two tiers high; they were two tiers over part of the warehouse but no higher than that.

Q. Did you walk over the top of the tiers?

A. I walked over the barrels; yes.

Q. You could not see the underneath tier from walking over the top tier?

A. Oh, yes, they are cradled in so you can see them very easily.

Q. You could not see the underneath side of every barrel?

A. No, you could not see the underneath side of every barrel, but you could see the floor under every barrel, with the exception of exactly underneath it.

Q. Did you stoop down to look under the barrels, each of them as you passed?

A. No. Not all of them. [155]

Q. Your examination was simply that you walked through and saw the barrels and walked over the top of them?

A. My examination was that I walked in and examined the barrels, as I have done in every other shipment.

Q. It is quite possible that some of them were stained on the underneath side where they were piled in tiers, without your observing it?

A. There is a possibility that there might have been a stain on the underneath side of some of the barrels. That may have been caused in filling the barrels.

Mr. BOLAND.—To the last part of the answer I

move that it be stricken out as being a volunteer statement and not responsive to the question.

Redirect Examination.

Mr. McKEON.—Q. If some of the barrels were stained on the immediate bottom, on the portion nearest to the floor, on the lower tier, could or could not that stain have been placed there in filling the barrels? A. It could have been. [156]

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

I certify, that, in pursuance of stipulation of counsel, on Thursday, October 31, 1918, before me, Francis Krull, a United States Commissioner for the Northern District of California, at San Francisco, at the offices of Messrs. McCutchen, Olney & Willard, in the Merchants Exchange Building, in the City and County of San Francisco, State of California, personally appeared George C. Arnold, a witness called on behalf of the libelant in the cause entitled in the caption hereof; and Joseph McKeon, Esq. (for McCutchen, Olney & Willard), appeared as proctor for the Libelant; and Samuel Knight, Esq., and F. E. Boland, Esq., appeared as proctors for the respondent, and the said witness having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in said cause, deposed and said as appears by his deposition hereto annexed.

I further certify that the deposition was then

and there taken down in shorthand notes by Charles R. Gagan, and thereafter reduced to typewriting; and I further certify that by stipulation of the proctors for the respective parties, the reading over of the deposition to the witness and the signing thereof were expressly waived.

And I do further certify that I have retained the said deposition in my possession for the purpose of delivering the same with my own hands to the clerk of the United States District Court for the Northern District of California, the Court for which the same was taken.

And I do further certify that I am not of counsel, nor attorney [157] for either of the parties in said deposition, and caption named, nor in any way interested in the event of the cause named in the said caption.

IN WITNESS WHEREOF, I have hereunto set my hand in my office aforesaid this 12th day of February, 1919.

FRANCIS KRULL,
United States Commissioner, Northern District of
California, at San Francisco.

[Endorsed]: Filed Feb. 12, 1919. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [158]

In the Southern Division of the United States District Court in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,302.

CHARLES D. WILLITS and I. L. PATTERSON, Copartners, Doing Business Under the Firm Name of **WILLITS & PATTERSON,**
Libelants,

vs.

The Japanese Steamship, "KOREA MARU," Her Engines, Boilers, Boats, Tackle, Apparel and Furniture,

Respondent.

Depositions of T. Ota, Y. Iijima, and Y. Yamamura,
Taken on Behalf of the Claimant Before John E. Manders, a Notary Public in and for the City and County of San Francisco, State of California. [159]

San Francisco, California, Monday, January 21st,
1918.

In the Southern Division of the United States District Court in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,302.

CHARLES D. WILLITS, and I. L. PATTERSON, Copartners Doing Business Under the Firm Name of WILLITS and PATTERSON,

Libelants,

vs.

The Japanese Steamship "KOREA MARU," Her Engines, Boilers, Boats, Tackle, Apparel and Furniture,

Respondent.

Notice of Taking Depositions De Bene Esse of Captain T. Ota and Y. Yamamura.

To Libelants Above Named and to Messrs. McCutchen, Olney & Willard and Ira A. Campbell, Their Proctors:

You and each of you will please take notice that on Monday, the 21st day of January, 1918, at the hour of two o'clock in the afternoon thereof, at the office of the undersigned, No. 1306 Hobart Building, No. 582 Market Street, in the City and County of San Francisco, State of California, claimant herein will take the depositions *de bene esse* of T. Ota, Captain, and Y. Yamamura, Chief Officer, respectively, of the Japanese steamer "Korea Maru," witnesses to be called on behalf of

claimant, who are about to depart from said City and County and from the United States bound on a voyage to sea, before John E. Manders, Notary Public, in and for the City and County of San Francisco, State of California.

Dated: San Francisco, California, January 18, 1918.

SAMUEL KNIGHT,
Proctor for Claimant. [160]

Due service and receipt of a copy of the within notice of taking depositions is hereby admitted this 18th day of January, 1918.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
Proctors for Libelants. [161]

In the Southern Division of the United States District Court in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,302.

CHARLES D. WILLITS, and I. L. PATTERSON, Copartners Doing Business Under the Firm Name of WILLITS and PATTERSON,

Libelants,

vs.

The Japanese Steamship "KOREA MARU," Her Engines, Boilers, Boats, Tackle, Apparel and Furniture,

Respondent.

**Notice of Taking Deposition De Bene Esse of T.
Miyamai.**

To Libelants Above Named and to Messrs. McCutchen, Olney & Willard and Ira A. Campbell, Their Attorneys:

You and each of you will please take notice that on Monday, the 21st day of January, 1918, at the hour of two o'clock in the afternoon thereof, at the office of the undersigned, 1306 Hobart Building, No. 582 Market Street, in the City and County of San Francisco, State of California, claimant herein, will take the deposition *de bene esse* of T. Miyamai, first engineer of the Japanese steamship "Korea Maru," a witness to be called on behalf of claimant, who is about to depart from said City and County and from the United States bound on a voyage to sea, before John E. Manders, notary public, in and for the City and County of San Francisco, State of California.

Dated: San Francisco, California, January 19, 1918.

SAMUEL KNIGHT,
Proctor for Claimant. [162]

Due service and receipt of a copy of the within notice of taking deposition is hereby admitted this 19th day of January, 1918.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
Proctors for Libelant. [163]

In the Southern Division of the United States District Court in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,302.

CHARLES D. WILLITS, and I. L. PATTERSON, Copartners Doing Business Under the Firm Name of WILLITS and PATTERSON,

Libelants,

vs.

The Japanese Steamship "KOREA MARU," Her Engines, Boilers, Boats, Tackle, Apparel and Furniture,

Respondent.

BE IT REMEMBERED, that pursuant to the notices hereunto annexed, on Monday, January 21st, 1918, at the office of Samuel Knight, Esq., No. 1306 Hobart Building, No. 582 Market Street, in the City and County of San Francisco, State of California, personally appeared before me, John E. Manders, a notary public in and for the City and County of San Francisco, State of California, and the notary public named in said notices, authorized to take acknowledgments of bail and affidavits, etc., T. Ota, Y. Iijima,, and Y. Yamamura, witnesses called on behalf of the claimant;

Samuel Knight, Esq., appeared as proctor for the claimant, and Joseph B. McKeon, Esq., representing Messrs. McCutchen, Olney & Willard, appeared as proctors for the libelants.

P. M. Miyasaki, a competent interpreter of the Japanese language, having been first duly sworn to translate from English into Japanese the oath administered by the notary public to said [164] witnesses, and the questions, both on direct and cross-examination propounded to them, and from Japanese into English the answers of said witnesses to said questions, acted as interpreter.

Thereupon said witnesses having been by me, through said interpreter, first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in said cause aforesaid, did thereupon depose and say as is hereinafter set forth. [165]

Deposition of T. Ota, for Claimant.

Direct Examination.

(By Mr. KNIGHT.)

Q. Captain Ota, you are the captain of the steamer "Korea Maru," are you not?

A. Yes, sir.

Q. How long have you been the master of that vessel?

A. From the first voyage of the "Korea Maru," that is to say, about the first part of August, 1916.

Q. "The first voyage of the 'Korea Maru'" under the Toyo Kisen Kaisha flag—I suppose that is what you mean, Captain? A. Yes, sir.

Q. Are you about to go to sea, Captain, on Wednesday of this week, as master of the steamer "Korea Maru"? A. Yes, sir.

Q. Bound for Yokohama and other Japanese and

(Deposition of T. Ota.)

Chinese ports? A. Yes, sir.

Q. Captain, I show you what purports to be a blue-print of the steamer "Korea Maru" and the steamer "Siberia"; will you state whether or not that blue-print correctly shows, particularly, the cargo carrying portion of the steamer during the time that you have been master of her?

A. Yes, sir.

Q. I call your particular attention to the holds which have been designated No. 1 hold, No. 2 hold, or, 1 hatch, 2 hatch, and 3 hatch; have you three or four hatches on the forward part of the "Korea" at the present time?

A. The upper portion, two hatches, and down below there are four hatches.

Q. By the "upper portion," do you mean the main deck? [166]

A. You might call it the main deck, but we do not call it that; we call it "upper deck."

Q. There are two hatches to the upper deck, and will you state whether or not there are two sections to each hatch, speaking now of the forward part of the vessel?

A. Yes, sir; the upper portion is one while it is again divided into two sections down below.

Q. Then, how are those sections—what are those sections called on the vessel?

A. Do you mean by the name of the hatch or the deck?

Q. I want to know how they are designated as

(Deposition of T. Ota.)

far as the cargo is concerned so as to show where the cargo is stowed.

A. We designate by numbers; first we commence from No. 1.

Q. You commence from No. 1 hatch, and how do you designate the space under No. 1 hatch?

A. No. 2.

Q. That is, No. 1 comprises No. 1 and 2?

A. Yes, sir.

Q. No. 1 and No. 2 holds? A. Yes, sir.

Q. Under 1 hatch is No. 1 and No. 2 hold; under No. 2 hatch what are the numbers of the holds?

A. No. 2 hatch, No. 3 hold.

Q. And where is No. 4 hold?

A. The one next to hold 3, No. 4.

Q. That is, No. 3 and 4 are supplied from No. 3 hatch; is that right? A. Yes, sir.

Q. Now, is the hatch used that is under the saloon on the forward part of the "Korea," the hatch to which I am pointing, the hatch under the saloon; is that hatch used?

A. Yes, sir, we do use it.

Q. And what is the name of that hatch?

A. Hatch No. 4.

Q. And what is the hold called under hatch No. 4? A. We call it hold No. 4.

Q. Hold No. 4? A. Yes. [167]

Q. Now, taking the after part of the vessel; how many hatches are there aft of the engine-room?

A. Four.

Q. How are those hatches numbered?

(Deposition of T. Ota.)

A. The number continues commencing from No. 1 hatch in the front part of the steamer.

Q. And what is the first hatch aft of the engine-room, what number? A. Hatch No. 5.

Q. Then, are those numbered after the engine-room 5, 6, 7 and 8? A. Yes, sir.

Q. Then, this "No. 4" here does not describe this hatch? A. No, sir.

Q. I am referring to the legend marked "No. 4 hatch," Mr. Reporter. Captain, when did you first see the barrels of cocoanut oil that was taken on board the "Korea Maru" at Manila in early July, 1917?

A. Now, I have forgotten the date, but it was sometime early in July; it was about the 7th or 8th. I saw the cocoanut oil at the time of loading at Manila.

Q. What was the external appearance of that cocoanut oil?

A. At the time I saw the barrels of cocoanut oil they were scattered in and around the warehouses at Manila.

Q. What was the external appearance of the oil, the barrels?

A. I saw that a number of the barrels were stained; on some appeared the cocoanut oil outside. I do not know whether it perforated through the wood that made the barrels or leaked through.

Q. Under whose direction was the cocoanut oil stowed on the steamer?

A. We received an order from our agent at

(Deposition of T. Ota.)

Manila and the chief officer directed the loading.

Q. What is the chief officer's name?

A. U. Kaondo.

Q. Mr. Kaondo has left the steamer, has he not?

A. He left the steamer at Yokohama on this voyage. [168]

Q. And state whether or not he is employed by the company in Yokohama. A. Yes, sir.

Q. Do you know, Captain, where these barrels of cocoanut oil were stowed on the vessel?

A. Yes, sir.

Q. Will you point on the blue-print to the place or places where this cocoanut oil was stowed. Now, will you point, Captain— A. No. 5.

Q. Is that known as tank No. 5? A. Yes, sir.

Q. I will mark that with a cross. Do you know how many barrels were stowed in tank No. 5?

A. Why, I can't give you the exact number, but the approximate number.

Q. I think we can get the exact number. Now, was there any of that cocoanut oil stowed in any other part of the vessel than tank 5?

A. Yes, sir.

Q. In what other part of the vessel was some of that cocoanut oil stowed? A. In hold 7.

Q. They are both aft, are they not?

A. Yes, sir.

Q. Now, then, Captain, I ask you whether—

A. This is 7.

Q. Look at it and see if that is 7. Stowed here (indicating)? A. 7; the lower hold.

(Deposition of T. Ota.)

Q. It was stowed in the lower hold of No. 7, was it—No. 7 hatch? A. Yes.

Q. The place that I mark with a circle and a cross inside?

A. Yes, sir, and above the shaft in No. 7.

Q. I will mark that “No. 7.” Some of the cocoanut oil was then stowed in No. 7 hold, lower hold?

A. Yes.

Q. Was the cocoanut oil at that time stowed in any other hold on the occasion of the voyage from Manila to Hongkong and then to San Francisco, than in No. 5 and No. 7? A. No. [169]

Q. Captain, are you familiar with No. 5 tank?

A. Yes, sir, I do.

Q. What means of ventilation, if any, has that No. 5 tank?

A. There are four means to get fresh air, and two of them are through the shaft alley and two of them ventilation tubes inside of the hatch, inside of the tank.

Q. Can you describe a little more particularly, Captain, those ventilators you have just spoken of?

A. Yes, I know the particulars.

Q. Well, where does each of these ventilators lead from, these two ventilators that ventilate No. 5 tank?

A. Two ventilators in hold No. 5 get fresh air through the shaft alleys and one of them presses hot air through the upper part of the deck. Those two ventilators have doors, and those doors, the important part, in hold No. 5. Both of those two

(Deposition of T. Ota.)

ventilators in hold No. 5 and each and every one of them, has one door on each and every one of those tubes. The size of the door is five feet high and twenty-two inches in width.

Q. Let me see if I understand that: On each ventilator that leads up from the shaft alley to the upper deck is a door in tank 5, is that right?

Mr. McKEON.—Just a minute. I object to that question on the ground that it is not what the witness testified and is leading.

Mr. KNIGHT.—I will withdraw that question, then.

Q. How many shaft alleys are there?

A. Two shaft alleys on the steamer, both underneath of the place where the cocoanut oil was stored only one alley.

Q. And how many shafts? A. Two.

Q. One port and one starboard?

A. If you go a little further to the end of the steamer it is as you say. [170]

Q. Is there a shaft leading from the starboard side of the engine to the propeller? A. Yes, sir.

Q. And is there a shaft leading from the port side of the engine to another propeller?

Q. How many shaft alleys are there leading from the engine-room back to the propellers?

A. There are two, but around the engine-room there is a big space aft of the engine-room.

Q. Let me see that I understand: There is a big space aft of the engine-room and then there are two alleys leading to the propellers; is that right?

(Deposition of T. Ota.)

Mr. McKEON.—Commencing at that place.

A. Yes, sir.

Mr. KNIGHT.—Q. What is the space under No. 5; how is the space under No. 5 occupied?

A. Shaft alley.

Q. And what is the place known as thrust recess; for what purpose is that opening or space used?

A. That belongs to the engine department and I cannot explain very well.

Mr. McKEON.—Q. No shaft alley runs through that?

A. Yes; it says "shaft alley," but there are little outsides in there.

Mr. KNIGHT.—Q. Is all this space aft of the engine-room down to the bulkhead which separates the 7 and 8 holds—is all that space open?

A. Yes, sir. It is all open space, and you can only come in from the engine-room.

Q. You said that there were two ventilators that led from the shaft alley through No. 5 tank to the upper deck; is that correct? A. Yes, sir.

Q. Did those ventilators have any opening into No. 5 tank? [171] A. Yes, sir, they are.

Q. What are those openings; what was the size of those openings?

A. As I have testified before, those doors are twenty-two inches in width and five feet in height.

Q. Did each ventilator have a door of similar size? A. Yes, sir.

Q. When each door was opened, state whether or not any air would come into No. 5 tank?

(Deposition of T. Ota.)

A. It is made in such way that one of them brings in fresh air from outside while another one sends up all the hot air from that hold.

Q. Answer the question. Do you put the questions as I put them to you? Ask the captain if those doors are open if air comes through the ventilator?

A. What do you mean; do you mean that air comes?

Q. Does air come through that ventilator if the door is open? A. Yes, sir.

Q. Where does the air come from?

A. From the outside.

Q. But does it come through the shaft alley and up the ventilator or does it come from the outside and down the ventilator?

A. Sometimes in most of the cases the cold air comes through the shaft alley, but sometimes on account of the atmosphere and the weather during the voyage the air comes directly from outside into this ventilating tube.

Q. Then does it depend upon the atmosphere outside as to the direction from which the air gets into tank No. 5? Do you understand the question—does it depend on the atmosphere outside as to the direction from which the air comes into No. 5 tank?

A. I cannot of course tell which one draws air from outside and which one gives out air from hold No. 5, but at any rate it depends on the outside atmosphere during the voyage, and one of them [172] at any rate draws air from outside and gives

(Deposition of T. Ota.)

out hot air from other tubes.

Q. Does one ventilator draw the air from the shaft alley?

A. Yes, cold air from the shaft alley; then send up to the upper deck. In that case this door which I have testified, twenty-two inches in width and five feet in height, gives plenty of cold air into hold No. 5 and hot air also goes out from the same opening on the other tube.

Q. Hot air from No. 5, or hot air from where?

A. I cannot say definitely that it is the hot air, but I say that the air that remained there will go out through other tubes in hold No. 5.

Q. Oh, the air that remains in No. 5 goes out, do I understand—goes out through another ventilator?

A. I mean that one ventilator sends up cold air from hold No. 5.

Q. Now, what does the other ventilator do?

A. It largely depends upon where you are staying. Sometimes, of course, when the temperature changes, the cold air comes into hold No. 5 from the outside, but it often occurs that cold air comes from the shaft alley; it largely depends on the atmosphere outside.

Q. What is the condition of the air in the shaft alley?

A. The condition of the air in the shaft alley is always circulating.

Q. When the vessel is at sea state whether the air in the shaft alley is warm or is cool?

A. It is always cool.

(Deposition of T. Ota.)

Q. State whether or not there are any other ventilators further aft than the one we have been referring to leading from the deck to the shaft alley?

A. Yes, sir, there are quite many.

Q. And state whether or not air gets to the shaft alley from those ventilators?

A. Yes, sir. There is plenty of air [173] that comes in that almost makes a person feel cold.

Q. Captain, do I understand that air comes from the outside down through one of these or some of these other ventilators down into the shaft alley?

A. Yes, sir.

Q. What is the size of the two ventilators that go through tank 5?

Mr. McKEON.—I object to that question on the ground that the witness has not stated that two ventilators go through tank 5.

Mr. KNIGHT.—I will withdraw that question.

Mr. McKEON.—Hold 5.

Mr. KNIGHT.—Q. Is tank 5 the place where some of this oil was stowed?

A. You mean when it was loaded?

Q. When the cocoanut oil was loaded?

A. Yes, sir.

Q. State whether or not tank 5 is a part of hold 5?

A. Yes, sir. We do not call it "Tank 5" at all; we call it hold 5. Do I understand you to say that these two ventilators pass through hold 5 where some of the barrels of oil were stowed?

A. Do you mean the ventilators?

Q. The ventilators leading up.

(Deposition of T. Ota.)

A. You must understand there are four ventilators in hatch No. 5; in hold No. 5 there are two, which are some of those four.

Q. Tell the captain when I refer to tank 5 I refer to that part of hold 5 that contains these barrels of cocoanut oil, so that he will understand?

A. You understand that hatch No. 5 also contains hold No. 5. I want it clear that there are four ways in getting air into No. 5, and two of them were in No. 5 where the cocoanut oil was loaded.

Q. I am directing all questions entirely to that part of hold No. 5 where the cocoanut oil was stowed, and I have reference to that part of the hold where the cocoanut oil was stowed?

A. Yes, I understand now; but I want you to understand there are [174] not only two ventilators, but there are also four in hatch No. 5.

Q. Now, speaking of hold No. 5 where the cocoanut oil is, were there two ventilators going through that hold, that part of the hold, that hold 5 where the cocoanut oil was stowed—going through the hold? I want only to designate that part of hold 5 where the cocoanut oil was stowed; I am asking the captain now about that part of the hold, no other part of the vessel?

A. I understand now, but please understand that there are four ways in hold No. 5.

Q. Now, then, were there two ventilators going through that hold No. 5 from the shaft alley to the upper deck? I want to see that we are using the same expression; only referring to this—now, what

(Deposition of T. Ota.)

do you call this little space there (referring to the place marked with a cross inside of a circle); what do you call that little space, Captain? A. 5.

Q. 5 what? A. 5 hold.

Q. Are there two ventilators leading through 5 hold from the shaft alley to the upper deck?

A. You see, the captain refers to other places.

Q. I do not want that.

A. There are two ventilators, but I have to mention the other two for the reason that the air comes in through the other two in connection with hold No. 5.

Q. Will you tell the captain I am going to get to that in a few minutes? Now, Captain, will you answer whether or not there are two ventilators leading from hold No. 5 through the shaft alley to the upper deck? A. Yes, sir.

Q. And those are the two ventilators each of which has the door that you have spoken of?

A. Yes, sir.

Q. Now, Captain, you spoke of two other ventilators; where are those two other ventilators you spoke of? [175]

A. Right here (indicating).

Q. Now, then, the captain refers to the cargo space immediately aft of the hold 5 to which he has been referring and which is marked by the cross surrounded by a circle. Then, there are two other ventilators in that place, are there, Captain?

A. Yes, sir.

Q. Where do they lead from?

(Deposition of T. Ota.)

A. The air from—

Q. Answer the question; where do they lead from; where does the ventilator lead from and where does it finish? I do not want anything about the air?

A. From the upper deck to down here, to the hold.

Q. What air circulates in those two ventilators?

A. Circulates in hatch No. 5 all over.

Q. Where does the air come from in those ventilators? A. Atmosphere.

Q. And it leads down from the atmosphere?

A. Yes, sir.

Q. Now, do you know what is the size of each of those two ventilators that you have just spoken of, the size of those two ventilators that he has just spoken of, leading down from the outside?

A. Each of those ventilators is more than one foot and a half in diameter.

Q. They are round, are they? A. Round.

Q. Have those ventilators that you have just been speaking of openings that allow the air to go through the different parts of the deck?

A. Yes. That is the place where the air comes in; that is the head of the ventilator.

Q. Does that ventilator extend down below that compartment? This blue-print shows that it only goes—what is that—the orlop-deck?

A. This ventilator comes down here. It is right as it shows on the print. This is where it ought to be, [176] because this is the place where all the air circulates through the holds through the hatch.

Q. How does the air get through the shaft alley

(Deposition of T. Ota.)

through the compartment which is marked as having a capacity of 703 tons?

A. The air in the shaft alley, it cools the bottom of this hold, but it does not get up at all.

Q. Do you know, Captain, the size of the upper 5 hold, where some of these barrels of cocoanut oil were stowed? A. Yes, sir, I do.

Q. Will you give the size, Captain? If you cannot remember, if you have a memorandum, if you know it is correct, you can use that.

A. 28 feet, 4 inches in width, and fore and aft 24 feet 2 inches, and the height 9 feet, 7 inches.

Q. What is the total width of the ship at that No. 5 hold? A. 62 feet.

Q. Captain, was there anything between the sides of this No. 5 hold and the skin of the ship?

A. In order to give air for that space there is wood around one side of the hold No. 5.

Q. There is wood for an air space?

A. On one side we have air space that is between the skin of the ship and the wood.

Q. But where is the fresh-water tank?

A. Two sides of hold No. 5 where the cocoanut oil was stowed are fresh-water tanks.

Q. There was a fresh-water tank on each side of hold No. 5 and between the hold and the skin of the ship? A. Yes, sir, on both sides.

Q. What was the number of the voyage upon which this cocoanut oil was taken from Manila to San Francisco?

A. Voyage No. 4 home. [177]

(Deposition of T. Ota.)

Q. Now, on that voyage were the fresh-water tanks used for storing the fresh water used on the vessel?

A. Both sides the tanks were filled with water and supplied with fresh water.

Q. Where is the ice kept on the steamer?

A. There is an ice chamber on the upper portion of hold No. 5.

Q. State whether or not the space for the storage of ice stretches across the vessel at that point above each of the water-tanks? A. Yes, sir.

Q. State whether or not the temperature of the water in the fresh-water tanks was affected by the operation of the engines on the steamer's homeward voyage. A. No, sir.

Q. Is there a bulkhead just aft of the engine-room? A. Yes, sir.

Q. Does it extend from one side of the vessel to the other?

A. What do you mean by one side?

Q. From one skin to the other, from port to starboard, except as to the part occupied by the thrust recess? A. Yes, sir.

Q. Do you know the thickness of that bulkhead?

A. I cannot give you the exact thickness, but approximately it is a little more than half an inch.

Q. In hold 5 will you state whether there was a wooden bulkhead on the inside? A. Yes, sir.

Q. State how near this wooden bulkhead was to the steel bulkhead just aft the engine-room.

A. About one foot.

(Deposition of T. Ota.)

Q. That is, the wooden bulkhead was about one foot from the steel bulkhead?

A. From the steel bulkhead.

Q. That separated the engine-room from the hold? A. You mean from that steel bulkhead?

Q. Yes, the steel bulkhead?

A. The air space is about [178] 91½ inches and the thickness of the wood is about 2 inches and a quarter.

Q. Then, as I understand it, there is the steel engine-room bulkhead, then comes a space of about 91½ inches, then comes a wooden bulkhead about 2 inches and a quarter in thickness; is that correct?

A. Yes, sir.

Q. Captain, do you know where the ice-making machinery is on the vessel?

A. I cannot tell you the exact position where this engine is situated, but if you desire to know I can point out about where this engine is in place at the present time.

Q. Now, Captain, do you know how much water you drew when you left Manila bound for Hong-kong on this voyage; how much water was the vessel drawing when she left Manila?

A. I don't remember, so I shall refer you to the log-book.

Q. Was the log-book kept by the chief officer under your direction, Captain? A. Yes, sir.

Q. Now, will you look at the log to refresh your memory and state what was the draft of the "Korea Maru" forward and aft on leaving Manila; July

(Deposition of T. Ota.)

7th or 8th, I think it was, Captain, when you left?

A. 26 feet and 6 inches aft and the front part of the steamer 21 feet.

Q. Captain, what draft did you have when you left Hongkong? You left at that time about the 17th or 19th?

A. The front part 23 feet 3 inches and 25 feet 3 inches aft.

Q. Captain, was that about your draft on the way over on the entire voyage; was that about the amount of water you were drawing?

A. No, sir, it is not so; it is a little heavier.

Q. You were drawing more water?

A. Much more.

Q. Now, Captain, when you were drawing 26 feet of water about how [179] far on the side of the vessel, referring to this hold No. 5, would by your water line?

A. The place where the cocoanut oil was loaded is about 5 feet below water level.

Q. Captain, what is the tendency of the water on the outside of a vessel in such climate as you had in going from Manila to San Francisco; does the water tend to heat or to cool the hold?

Mr. McKEON.—I object to that on the ground it is leading and suggestive.

A. Cooling inside of the hold.

Mr. KNIGHT.—Q. Ordinarily, Captain, under the circumstances that I have stated, as you go down deeper into the hold, does it get warmer or does it get cooler? A. Cooler as you go down.

(Deposition of T. Ota.)

Q. For what reason?

A. The deeper you go in the sea the cooler you get.

Q. State, Captain, what was the temperature on your voyage from Manila to Hongkong and from Hongkong by way of Japanese ports across the Pacific?

A. I cannot give you the degrees of heat, but it was the hottest season in the year.

Q. How did that voyage, as far as the heat is concerned, compare with other voyages, other like voyages, that is, other voyages from Manila to Hongkong to San Francisco?

A. Hot and warm all day long.

Q. How does it compare—was it colder or hotter?

A. Much hotter than other voyages.

Q. Does your log-book show the temperature on the different days taken on the bridge?

A. My log-book shows the temperature, which was taken every four hours.

Q. Will you refer to your log-book, Captain, or, if you can state it, you need not refer to it, and give some of the temperatures [180] on that voyage?

A. On July 8th, that is, the date of sailing from Manila, was 87 degrees.

Q. That is Fahrenheit, I take it? A. Yes, sir.

Q. At what hour?

A. That was 12 o'clock, and the hottest on that day.

Q. You can give us the highest and the lowest.

A. To Hongkong or to Japan?

(Deposition of T. Ota.)

Q. To Japan, or, put it this way—

Mr. McKEON.—(Reading:.) On July 8th 87 was the hottest and 74 the lowest.

Mr. KNIGHT.—Q. At what hour was it 74?

A. 4 o'clock in the morning.

Q. Now, Captain, what was the hottest weather that you encountered, on what days did the temperature go the highest?

Mr. McKEON.—(Reading from book.) The 9th is 87; 89 is the 10th, the hottest; the 11th is 93; 12th is 93; 13th, 94; 14th, 87; 15th, 81; the 16th is 79; 17th, 82; 18th, 75.

Mr. KNIGHT.—Are these taken at the same hour always?

Mr. McKEON.—I am taking the highest every day; they are all in the middle of the day. The 19th is 83; the 20th, 81; and that is at 4 o'clock in the afternoon; the 21st, 85, and that was 4 o'clock in the afternoon. The 22d, 82, 4 o'clock in the afternoon; the 23d, 87, at 4 o'clock in the afternoon; the 24th, 82, at 4 o'clock; the 25th, 85; the 26th, 89; the 27th, 87; the 28th, 80, at midnight; 29th, 82, at 8 o'clock at night; the 30th, 83, at mid-day, noon; the 31st, 80, noon; August 1st, noon—

Mr. KNIGHT.—Q. I think, instead of taking a lot of time going through there, I will ask you this: How high did the temperature get on your voyage?

A. I should think about 94 was the hottest day we got on the voyage. [181]

Q. Captain, did you see the barrels of cocoanut oil when they were discharged from the vessel here?

(Deposition of T. Ota.)

A. Yes, sir, I saw them.

Q. Were any of them broken?

A. Not that I know of.

Q. What was the character of the hatch covering on hold 5? A. You mean of what material?

Q. Yes, how was hold 5 covered?

A. We did not put anything on hold No. 5, and covered it with wood; we have a regular wood cover for the hold.

Q. And hold 5 was covered with a wooden cover on that voyage, is that right? A. Yes.

Q. How was that hold 5 drained; how did any fluid get from it?

A. There is a means that runs down from both sides to a tunnel that goes to the bilges.

Q. There were scuppers leading from hold 5 on both sides to the bilges, were there, in the shaft alley? A. Yes.

Q. And then the pumps took up the fluid there in the shaft alley and pumped it overboard?

A. Yes, all the waters and other fluids, everything come down to the bilges, and then pumped it out by means of a pump.

Q. At any time were the bilge pumps used for any unusual amount of fluid on the voyage; pump any unusual amount of fluid from the bilges?

A. Nothing happened in the voyage.

Q. Your log shows the height of the water in the bilges, does it not, where the pump is?

Mr. McKEON.—Are you going to introduce the log-book?

(Deposition of T. Ota.)

Mr. KNIGHT.—I do not think there is anything in the log either way. If there is anything, we will let it go in.

Mr. McKEON.—You will keep the log here so that we can refer to it later? [182]

Mr. KNIGHT.—Q. Is this log-book used on the “Korea”? A. No, we do not use this very one.

Q. Then this log-book can be left here?

A. We have the bilges height.

Q. I do not care about the bilges height, but the depth of the bilge water at any time was not unusual, was it?

A. No. Nothing happened like that. I can only say that there was nothing unusual, but as to the height of the water on each and every day this book can be referred to, or call in the chief mate.

Q. I do not think there is anything in it. Captain, could this be left in the office of the company, or do your regulations require you to have that always on board?

A. By the law I have to have it in my possession. By the Japanese law it is required to be in the possession of the Captain.

Mr. McKEON.—Q. You do not have to have that with you; you have another one?

A. I have to have this, and if you make arrangements with the manager of the concern and make arrangements with him, I have nothing to do with it at all.

Mr. KNIGHT.—Q. Captain, I ask you if you can identify this as being the correct stowage plan of the

(Deposition of T. Ota.)

Toyo Kisen Kaisha on that homeward voyage 4?

A. Yes.

Q. And the oil that is referred to is the oil, where it is marked "Oil," and then further aft where it is marked "Oil," to show where the oil is stowed?

A. Yes, sir.

Mr. KNIGHT.—In connection with the captain's testimony I will offer this stowage plan and this blue-print upon which the captain has testified.

I think that is all, Captain.

(The blue-print is received by the Notary and by him marked "Claimant's Exhibit No. 1," and the stowage plan is received and marked by said Notary "Claimant's Exhibit No. 2.") [183]

Cross-examination.

(By Mr. McKEON.)

Q. Who made up this stowage plan?

A. The chief officer.

Q. The man that is not with the ship now?

A. No, he is away.

Q. You do not know anything personally about it being accurate, do you?

A. Yes, I do. Do you mean concerning the oil?

Q. No, I am talking about this stowage plan.

A. That was first made by the chief officer and it has my O. K., and if I answer I know.

Q. How were these barrels of oil stowed in tank No. 5?

A. Hold No. 5 is its name. We placed wooden dunnage on the floor of the hold No. 5, and then we

(Deposition of T. Ota.)

placed the barrels of oil, three tier.

Q. Three on top of each other?

A. Yes, three tiers, and there was wooden dunnage between the barrels.

Q. Were the barrels stowed up on their ends or were they lying down on their sides?

A. We always stow them on the side, never up and down.

Q. Were they stowed athwartships or fore and aft? A. Fore and aft.

Q. How many tiers across the ship were there; they were three high, but how many tiers athwartship?

A. I do not know how many tiers; I don't remember how many barrels were across.

Q. Did they reach from one side of the tank to the other? A. Yes, sir, from one side to another.

Q. Was that tank loaded to capacity with that oil? A. Yes, sir.

Q. Do you remember the sizes of those barrels at all? [184] A. No, I don't remember.

Q. Is that compartment in which that cargo was stowed also referred to as a tank? A. Hold No. 5.

Q. No; that compartment that that cargo was stowed in in No. 5 hold, is that referred to as a tank?

A. Not that I know of. It is just like a tank; you might call it, but it is never known as a tank.

Q. That is what it is in shape; it is a tank, isn't it, a steel tank?

A. It is not a tank at all, and there are also

(Deposition of T. Ota.)

wooden bulkheads on the side, so it is not a tank in any sense of the term.

Q. What is the purpose of putting a wooden bulkhead between the engine-room and that compartment?

A. This is to prevent that any cargo that comes into this hold would not touch directly to the steel. In most of the holds you will find that wooden bulkhead for this purpose.

Q. It is just used then as a cargo batten?

A. Cargo batten.

Q. Is it a permanent bulkhead?

A. Yes; almost permanent purpose.

Q. What is the means of access into No. 5 hold where this cargo was stowed—how do you get into it?

A. By means of machinery situated in the lower part of the—

Q. I do not mean what you use to get in there, but how do you get in there; what cargo hatch do you use; what cargo hatch do you use to get into cargo 5 tank?

A. When hatch No. 5 is open and we can put in cargo inside of the hold No. 5.

Q. What do you do—load these barrels through No. 5 down past the main deck and past the orlop-deck? A. Yes.

Q. And then truck the cargo from the floor of the hatch over into [185] the opening into No. 5 tank, and load it that way?

A. The boat at that time was near the pier and

(Deposition of T. Ota.)

by means of winches those barrels were placed into hold No. 5 from the land from outside the steamer.

Q. You do not release those barrels from the cargo fall directly into No. 5 tank, do you?

A. Directly into the hold No. 5 without stopping anywhere.

Q. Captain, that cargo space is immediately abaft the engine-room, isn't it? Cannot he answer these questions yes or no? Tell him if he can answer these questions yes or no it will save a lot of time.

A. There is a space between the engine-room and this hold.

Q. Is there any cargo compartment between the engine-room and No. 5 tank?

A. No cargo compartment.

Q. Cargo batten? A. Yes.

Q. There is nothing between the engine-room and this cargo space in which this oil was stowed other than the steel bulkhead and the cargo batten?

A. Yes.

Q. What is the cargo compartment, Captain, immediately on top of No. 5 tank? A. Cargo space.

Q. Do you know what distance there is between the top of No. 5 tank and the top of the cargo space immediately above No. 5 hold?

A. I can't give you the exact size, but I should think it is about 8 feet.

Q. You can walk very conveniently there?

A. Yes.

Q. And that space, you say, runs the whole length of No. 5 hold? A. Yes, sir.

(Deposition of T. Ota.)

Q. In No. 5 hold, Captain, there are a number of compartments, are there not? A. Yes, sir.

Q. No. 5 that you have been referring to as a tank is a compartment in itself completely enclosed, is it not? [186]

A. Yes, the same as the one next to it.

Q. And all of those various compartments are divided off by bulkheads, are they not? A. Yes.

Q. And there is one ventilator from the atmosphere into No. 5 hold, isn't there—one intake?

A. There are two ventilators from outside for hold No. 5.

Q. Does this blue-print show one or two ventilators from the outside into No. 5 hold?

A. He says never mind about the blue-print, you can come down and see the ship yourself.

Q. That does not answer the question. Ask him to say yes or no?

Mr. KNIGHT.—I object to that on the ground that the blue-print speaks for itself as to what it shows and what it does not. Ask him what the fact is.

Mr. McKEON.—Q. Then this blue-print is not correct, Captain, is it?

A. There are two, but this blue-print does not show it; it might be so.

Q. Is the blue-print correct or is it not correct?

A. I cannot say yes or no for the reason that if it does not show, it might be wrong.

Q. Then you do not know whether you have two ventilators in No. 5 or not, do you?

(Deposition of T. Ota.)

A. There are two in the room, and he can come down and see it.

Q. Where does the other ventilator that you say opens into No. 5 lie with respect to the present ventilator; is it right alongside of it—the one that shows on the blue-print?

A. It commences from here and comes out here.

Q. They are right together, then, alongside of one another, are they—that one there and one adjoining it? A. There is another one on the other side.

Q. On the port side of the ship; this is the star-board ventilator [187] that shows on the blue-print? A. Yes, and it must be on the port side.

Q. And that is a pipe that runs down through the main-deck and through the orlop-deck down into the shaft alley?

A. No, this ventilator does not come down as far as the shaft alley.

Q. It comes down as far as the shaft alley?

A. No, it does not.

Mr. KNIGHT.—Let it appear in the notes that counsel is now referring to the ventilator leading into No. 5 and shown on this blue-print.

Mr. McKEON.—Q. Where does it stop, Captain?

A. You can see, as it is on the print, it stops at the upper part of the hold.

Q. What deck? A. The orlop-deck.

Q. The orlop-deck is above No. 5 tank, isn't it?

A. No, we do not have such place.

Q. What place are you talking about—the tank?

A. What do you mean by "tank," any way?

(Deposition of T. Ota.)

Q. I do not want to confuse the Captain. Tell him I am referring to the place where the oil was stowed in upper 5 hold when I say the tank.

A. You can see it very plainly on the print.

Q. Captain, the ventilator or the pipe from the ventilator shown on this blue-print stops at the orlop-deck, doesn't it? A. Yes.

Q. And the orlop-deck is above the place where this oil was stowed, is it not—this is on top of this (indicating)? A. Yes.

Q. And the other ventilator that you say leads into No. 5, is in a similar position, and stops at a similar place, does it not, on the [188] port side of the vessel? A. Yes, sir.

Q. Which of them takes out from the hold the hot air of the hold?

A. As I have testified previously, it largely depends upon the atmosphere; sometimes one of them draws in cool air and at others it gives hot air, and alternates upon the condition of the atmosphere.

Q. Does that all depend on which way the wind hits the ship, Captain?

A. Yes, it largely depends on the wind.

Q. Now, the purpose of that double system of ventilation, Captain, isn't it, is to make a perfect flow in one ventilator through the hold and out in the other ventilator on the opposite side?

A. Yes, sir. That is the reason I say it largely depends upon the condition of the atmosphere.

Q. It passes in one and passes through the hold and out the other, is that correct?

(Deposition of T. Ota.)

A. You must understand that the air that comes in from one ventilator tube, the same air would not go out, but air that has stayed in that space will go out in the other tube.

Q. But it is a circulation from one into the hold and from or out of the hold by means of the other one? A. Yes.

Q. Those ventilators that you are speaking of in No. 5 hold are in the extreme after end of No. 5 hold, aren't they?

Mr. KNIGHT.—That is, you refer to the ventilators other than those you have just been questioning about?

Mr. McKEON.—No. That is the question I am just directing him to.

A. No, it is not the extreme end of the hatch at all.

Q. About how far away from the extreme end of the hatch are those ventilators?

A. I should think it is more than six feet.

Q. And how long is the No. 5 hold? [189]

A. I don't remember.

Q. Fifty feet?

A. I can't tell; perhaps a little more than fifty feet.

Q. So that the cargo compartment to which we have been referring as No. 5 tank, in which was stowed this oil, takes up less than half of the forward space of No. 5 hold?

A. No, it does not take more than one-half.

Q. It takes less, I say.

(Deposition of T. Ota.)

A. Yes. I don't think it is more than one-third—about one-third.

Q. Where does the ventilating pipe enter No. 5 hold from the shaft alley? When I say No. 5 hold I mean the hole of No. 5 cargo compartment; when I say No. 5 tank I refer to the place where this oil was stowed in No. 5 hold.

A. Why, the air would not come in directly from the shaft alley.

Q. It would not? A. No.

Q. Then, there is no air entering into No. 5 hold from the shaft alley?

A. The air from the shaft alley only cools the bottom of the hold, but does not enter in.

Q. Immediately underneath the place that we call tank No. 5, in which was stowed this oil, is the engineer's quarters, isn't it—immediately below No. 5 tank? A. Yes.

Q. So that the thrust recess or engineer's quarters is not the shaft alley?

A. Yes, it is a part of the shaft alley.

Q. But it is not used for ventilating the bottom of No. 5 tank?

A. I said it is a part of the shaft alley because the pipe goes through there and also the cool air goes through there.

Q. But it does not ventilate the bottom of the No. 5 tank?

A. It cools the bottom of the hold No. 5.

Q. How does it cool the bottom of hold No. 5 if it is the crew's quarters?

(Deposition of T. Ota.)

A. That is the place where the engineers [190] come and get the cool air; naturally, the temperature there is pretty cool.

Mr. KNIGHT.—Q. Ask him if that is what he means by the engineers' quarters.

A. I mean the engineers' quarters, which is a part of the shaft alley.

Mr. McKEON.—Q. Engineers' quarters which is a part of the shaft alley?

Mr. KNIGHT.—I would like to know what "quarters" means—sleeping-place?

A. What is definition of engineers' quarters?

Mr. McKEON.—Q. That is what he wants him to give.

Mr. KNIGHT.—Q. What does he mean; counsel has asked him about engineers' quarters?

A. I did not use engineers' quarters at all. I thought you mean a place where engineers come around.

Mr. McKEON.—Q. No. Now, do you take the temperature of these various compartments regularly? A. Yes, sir, generally.

Mr. KNIGHT.—Do you mean of the tanks or—

Mr. McKEON.—The cargo compartments.

Q. How often?

A. For instance, those hatches and holds where there are ventilators, we remove the top of them in accordance with the atmosphere and also on the fine days we take off the hatch covers.

Q. That is the top hatch covers you are speaking of? A. Yes, these big hatch covers.

(Deposition of T. Ota.)

Q. That was not my question there. Will you read it, please? (Question read as follows: "Now, do you take the temperature of these various compartments regularly A. Yes, sir, generally. . . . Q. How often?") How frequently do you take the temperature of the [191] various cargo compartments?

A. I never take the temperature of the cargo at all.

Q. The holds?

A. The general practice is that we do not take the temperature of the holds, because there is no use of it at all.

Q. Then you do not know whether a hold has become heated or not, do you?

A. I go down there for inspection and although we do not take it by use of a thermometer, I can tell.

Q. How frequently did you go down on this particular voyage No. 4 to ascertain the temperature of hold No. 5?

A. I don't remember how often I went down there.

Q. Did you go down once or twice or three times?

A. On account of the cargo that was stowed down there I could not go inside of the hold No. 5. What he means by hold No. 5, he means tank. The cargo was stowed away up here, and that would not let me go in there.

Q. Cargo was stowed on top of hold No. 5?

A. Yes.

(Deposition of T. Ota.)

Q. So that you could not determine whether No. 5 tank was heated or not?

A. At that time I did not go down there so I could not give you the exact temperatures, but by the sea weather and the use of those two ventilators I know it was very cold.

Mr. McKEON.—I move that go out as not responsive.

Q. Then, as a matter of fact, you did not go down into No. 5 to determine whether that hold was heated or not?

A. It is not only the hold, but when the cargo is stowed on top of it, I cannot possibly go down and inspect the temperature.

Q. It is impossible to do it, Captain, the way the ship is loaded, isn't it?

A. Why, I did not go down there to inspect at all. I could not do it. But we did our best to remove [192] the top of the ventilators etc., and let the cool air come in.

Q. That was away up on top of the ship, the top deck? A. Yes.

Q. And the opening into No. 5 tank in which you loaded the barrels was covered over with hatch boards? A. Yes, it was covered up.

Q. With hatch boards?

A. With hatch boards, but it was not very tight.

Q. It was not tight? A. No.

Q. And on top of the hatch boards there was still cargo? A. There was some cargo.

Q. Was the place over which was placed these

(Deposition of T. Ota.)

hatch boards the only available opening into No. 5 tank?

A. Except the air that goes through the ventilators.

Q. Now, show me on blue-print No. 1 where a ventilator passes through No. 5 tank?

A. It goes up here.

Mr. KNIGHT.—The Captain refers to the top deck.

Mr. McKEON.—Q. Right abaft the smokestack.

A. I don't understand what that is.

Q. Well, show it this way, Captain; does a pipe pass up and down through No. 5 tank?

A. It goes up and down like this.

Mr. KNIGHT.—The Captain is pointing from the top deck down into No. 5 tank.

Mr. McKEON.—Q. Is there one or two pipes passing through No. 5 tank?

A. One on each side.

Q. On the port side and on the starboard side of No. 5 tank? A. Yes .

Q. Now, what is there from this pipe—that is a solid pipe, isn't it?

Mr. KNIGHT.—What do you mean by a solid pipe? [193]

Mr. McKEON.—The ventilator is a solid pipe.

Mr. KNIGHT.—You mean without openings?

Mr. McKEON.—I mean the ventilator is a solid pipe with openings at various places.

Mr. KNIGHT.—Ask him what it is made of.

Mr. McKEON.—Strike that out. What is the

(Deposition of T. Ota.)

ventilator made of, Captain?

A. It is made of steel.

Q. A round steel in the shape of a pipe?

A. As I have testified, the door itself is 22 inches—

Q. I am not asking about the door.

Mr. KNIGHT.—He wants the shape of it; is it round or square? A. Square.

Mr. McKEON.—Q. And then it passes down from the top deck of the ship down through No. 5 down through the main deck, through the lower deck and through the orlop-deck? A. Yes, sir.

Q. Down through the No. 5 tank?

A. No. 5 tank.

Q. And then does it go down into the shaft alley?

A. No, to this deck, the bottom side of that tank.

Q. Then, the ventilator that leads down on the forward part of No. 5 hold goes down further than does the one on the after part of No. 5 hold?

A. Yes, it goes to this extent, that one stops here while this one goes deeper, to this extent.

Q. Does it work in the same manner as the after ventilators that you have already described?

A. They are different because these two ventilators in front have a mushroom head, and it is square right here—pointing at the tanks.

Q. Are those openings into those holds always open, Captain?

Mr. KNIGHT.—The doors.

A. It largely depends on the nature of the cargo.

(Deposition of T. Ota.)

Lots of time on the loading of oils they are open.
[194]

Mr. McKEON.—Q. Why do you open them with oil cargo, Captain?

A. I don't know how it was, but they were open.

Q. Did you open them, Captain?

A. No, that is the place where the chief officer looks after.

Q. Then, you do not know yourself whether they were open or not, do you?

A. The chief officer told me that he opened the doors.

Mr. McKEON.—I move to strike that out on the ground it is hearsay.

Q. You say, Captain, that the doors of these ventilators are opened and closed depending upon the cargo that you load; is that the fact? A. Yes.

Q. Do you think that the doors were open at this time because you were loading oil in these compartments?

A. I should judge that they were open because the season was hot at that time.

Q. Then, you do not think that oil is cargo that requires ventilation?

A. Perhaps it is better for the oil to have doors open.

Q. You are not sure of that, though, Captain; you only think that is so?

A. I should judge it is better.

Q. In your opinion, is oil cargo that requires a great deal of ventilation?

(Deposition of T. Ota.)

Mr. KNIGHT.—I object to the question as being irrelevant, immaterial and incompetent, and not proper cross-examination,—as to what the captain's individual belief was as to the quantity of ventilation that the oil requires.

A. It largely depends upon the kinds of oils you accept as cargo, but any cocoanut oil, I think it is better to give air ventilation.

Mr. McKEON.—Q. Captain, was the cargo in No. 5 tank loaded right from the bottom of the compartment to the ceiling? [195]

A. It is absolutely impossible to do that for, as I have told you, we loaded for three tiers; in other words, I made only three tiers high.

Mr. KNIGHT.—Q. What was the space above the tops of the tiers?

A. I cannot give you definite number of feet, but as I have told you the height of the hold, so you can measure up the height of the size of the barrels and deduct the same.

Mr. McKEON.—Q. You do not know, Captain, do you?

A. I know there was plenty of space, but I cannot give you the number of feet.

Q. Were you down into No. 5 tank prior to the time they put the hatch covers on it after the oil was loaded?

A. No, I did not go in down there.

Q. So that you do not know anything about how the cargo was loaded in that hold?

A. Yes; I know there was plenty of space from

(Deposition of T. Ota.)

the top of the barrels to the ceiling, for the reason that the height of the hold is about nine feet, and judging from that standpoint there was plenty of space.

Q. But did you not see it, Captain?

A. You understand, I told you that I did not go down into the hold, but I looked at it.

Q. As a matter of fact, they were stowed five high, weren't they, Captain—five tiers high?

A. They were in three tiers, and the report, which should be the correct and proper one, was reported three tiers, from the chief officer.

Q. Then you get your information about the tiers from what the chief officer told you?

A. Yes, I read in the report of the chief officer, too.

Mr. McKEON.—I move to strike out the testimony of the witness upon the number of tiers and how the tiers of barrels of cargo [196] were stowed in No. 5 hold and the manner it was stowed, as hearsay.

Mr. KNIGHT.—The Captain said he looked down into the hold and saw how it was stowed.

Mr. McKEON.—Q. Captain, did you see the cargo that was in No. 5 tank before it was discharged at San Francisco? A. Yes, I saw them.

Q. What condition was it in?

A. I saw the three tiers at that time, even.

Mr. KNIGHT.—Q. You say you saw the three tiers at that time; what time do you refer to?

A. At the time of discharging the cargo.

(Deposition of T. Ota.)

Mr. McKEON.—Q. What condition were the barrels in then in the No. 5 tank?

A. As I saw them, the oil had perforated all through around the barrels.

Q. The hoops of the barrels—had they fallen off?

A. If I remember correctly, I did not see any hoops removed from the barrels.

Q. Did you see any oil about the floor of No. 5 tank?

A. I saw the presence of oil on the floor, but I did not see very much fluid.

Q. Did the floor of No. 5 tank show any evidence of being stained with oil?

A. Yes, I saw the presence of oil on the floor.

Q. As a matter of fact, you saved two cans of that oil, didn't you, Captain—scraped up from the floor of the tank?

A. Who do you mean by that?

Q. The ship? A. I did not see that.

Q. Did you ever hear anything about saving two cans of oil which had been scraped up on the floor of that ship when you arrived in San Francisco?
[197]

Mr. KNIGHT.—I object to that question as calling for hearsay testimony, whether the captain had ever heard that anybody else had ever scraped up oil from that tank? A. I never heard of it.

Mr. McKEON.—Q. None of the oil that was in that room, in that tank No. 5, was saved during that voyage, was it?

A. I never even heard of it during the voyage.

(Deposition of T. Ota.)

Q. Are there scuppers leading out of No. 5 tank?

A. Yes, it goes to the bilges.

Q. Is it possible to open and close those scuppers?

A. Yes, it can be done. The scupper is always open so you can't do it, but at the bottom of the scupper you can do this thing.

Q. If oil ran out through the scuppers of No. 5 tank and on into the bilges, how would it get overboard?

A. What do you mean by getting it "overboard"?

Q. Off the ship.

A. When the bilge gets a certain height we have to pump out all the water contained there into the sea.

Q. And if there were any oil in that bilge you could see it, couldn't you?

A. I didn't see any oil.

Q. I am not asking if you did see it.

A. Understand we can never look at it because it contains all sorts of other waters, and the means of discharge is into the sea; that is, you understand, the bottom of the ship is inside of the sea, and it goes out from that door into the sea, entirely outside.

Q. Well, if the barrels in No. 5 tank leaked and the oil left those barrels and ran over the floor of No. 5 tank, how would that oil get off the ship; give an outline of what course it would take in getting out?

A. If there is any fluid in tank No. 5 it would go down into a scupper that would lead into the

(Deposition of T. Ota.)

bilges, [198] and then be discharged by means of pumps from that portion of the steamer that is below sea water level into the sea.

Q. And you can see what you are pumping?

A. No, you can never see what is done at all.

Q. Ever sound your bilges? A. About twice.

Q. How do you do that?

A. There is a pipe that goes through the lower portion of the steamer and you can find out the height by putting in some scale inside of the tube.

Q. And after you put the scale into the pipe you look at the scale, don't you, to see what it measures? A. Yes, sir.

Q. Upon arrival in San Francisco, Captain, what was the condition of the barrels in No. 5?

A. The conditions were bad, but on account of the thinness of the wood which made the barrels, the contents was all perforated through the wood all over the barrels.

Mr. KNIGHT.—Was that the barrels in the after part of No. 7?

Mr. McKEON.—No, No. 5. I move to strike out the conclusion of the Captain as to the reason of the leaking, on the ground it is not responsive.

Q. Was the floor covered with oil at that time, Captain? A. Yes, I saw the presence of oil.

Q. How many times did you go down into No. 5 tank after you arrived in San Francisco?

A. I did not go inside of the tank, but I have looked down quite often from the deck above.

Q. What was the condition of the cargo in No. 7

(Deposition of T. Ota.)

hold when you arrived in San Francisco?

A. The conditions were good.

Q. And how far away is No. 7 hold from the engine-room—from here to here, how far?

A. 150 feet.

Q. 150 feet? A. Yes.

Q. The place where the oil was stowed in No. 7 hold was the same height above the bottom of the ship as was the place where the oil [199] was stowed in No. 5 tank, was it not?

A. Why, it might be the same height, but the space in hold No. 7 is much smaller and the number of the barrels in hold No. 7 was much less than five.

Q. I appreciate that, but you have not answered the question. Will you read the question again?

(Question read.)

A. I do not see any difference at all. Perhaps it might be the same. I never measured it myself.

Q. The difference from the keel to the place where the oil was stowed in No. 7 is identical with the distance from the keel to the place where the oil was stowed in No. 5?

A. I should judge it is about the same.

Q. How many ventilators have you in No. 7, Captain? A. Two ventilators.

Q. Why do you put two ventilators in No. 7 and four in No. 5?

A. Because the number of ventilators is according to the size of the hatches and holds.

Q. Was there anything else stowed in No. 5 tank with the oil?

(Deposition of T. Ota.)

A. We did not put anything at all in tank No. 5.

Q. Other than the oil? A. Other than the oil.

Q. Have you always carried cargo in tank No. 5?

Mr. KNIGHT.—I object to the question as incompetent, irrelevant and immaterial.

A. All the time.

Mr. McKEON.—Q. Captain, if you had closed the scuppers leading out from No. 5 tank, would you have been able to save any oil that may have leaked out of the barrels loaded in that compartment?

A. In the first place, I didn't know that the oil was coming down.

Mr. McKEON.—That is not the question. [200]

Mr. KNIGHT.—I want to get the rest of the answer.

A. And moreover it is impossible to finish the scuppers.

Q. What do you mean? A. Close the scuppers.

Q. Why?

A. A scupper is made in such a way that you cannot close it.

Mr. McKEON.—Q. Is a scupper customarily aboard ship so that you cannot close it? A. Yes.

Q. Are all the scuppers aboard the "Korea Maru" such that you cannot close them?

A. Not only on the "Korea Maru," but on all other ships, the scuppers could never be closed—on most of the ships.

Q. Captain, is it hotter alongside of the engine-room than it is in No. 7 hold?

(Deposition of T. Ota.)

Mr. KNIGHT.—I object to that question as being improper cross-examination and being indefinite as to what part of the engine-room is referred to.

Mr. McKEON.—Q. Immediately abaft the engine-room in any cargo compartment below the orlop-deck?

Mr. KNIGHT.—And I further object on the ground that the conditions are not stated; that is, the condition as to ventilation and the conditions surrounding that tank 5; that is, the condition of the fresh-water tank on each side extending up and beyond the height of the ceiling of the No. 5 tank.

A. On account of the presence of ventilators in No. 5 it is not hotter.

Mr. McKEON.—Q. That was not the question I asked. In your opinion, Captain, is it hotter immediately abaft the engine-room or engine-rooms than it is in No. 7 hold?

Mr. KNIGHT.—Same objection.

A. Why, in this particular boat I should think that the hold next [201] to the engine must be this No. 5, but as I have spoken, on account of the presence of the fresh-water tanks around the sides and also a little air space between the wood and the bulkhead and also two ventilators, it is not hotter than hatch No. 7.

Mr. McKEON.—Q. Do you load any cargo in bunker No. 1 immediately forward of the engine-room, Captain?

Mr. KNIGHT.—Coal-bunker, I suppose?

(Deposition of T. Ota.)

Mr. McKEON.—Coal-bunker.

A. Nothing but coal.

Q. Did you make any examination of these barrels other than standing on top of the orlop-deck and looking down into the No. 5 tank?

A. Yes; I made an examination on the barrels which were discharged from the ship at San Francisco.

Q. Did they have hoops around them?

A. Yes, each and every one of them I examined.

Q. How many hoops did these barrels have?

A. I did not count the number of hoops on each and every barrel, but I should judge there were about six or seven of them on each and every barrel.

Q. On this trip, Captain, did you ever have any weather that necessitated closing up the ventilators?

A. Voyage No. 4?

Q. The one that the damage was done on?

A. On account of the extreme hot weather we never closed the ventilators at all.

Q. During the summer months, Captain, do you or do you not expect hot weather on a voyage from Manila to San Francisco?

A. Yes, I do expect it.

Q. Captain, on your direct examination you said that you first saw these barrels at loading and in another place you said that you saw them in the warehouse; how many times did you see them prior [202] to your departure from Manila?

A. You understand that the ship arrives at

(Deposition of T. Ota.)

Manila at the wharf and in front of the waterfront is a big warehouse and in front of these houses there were standing these barrels, and, in fact, I have seen them almost every day.

Q. Waiting for shipment, were they?

A. I should think so.

Q. How were they transported to the ship?

A. They were loaded inside of the hold by means of cranes.

Q. I did not ask that. How were they brought to the ship?

A. No means at all. Here is the warehouse and in front of those warehouses there were a number of barrels, and alongside of that was the ship, and they were simply brought inside of the ship by means of the cranes.

Q. The weather was cloudy that day, wasn't it?

A. I don't know whether it was cloudy or not, but it was extremely hot.

Q. Refer to your log, Captain, of the day you left Manila; what does it say in reference to the condition of the weather?

A. Well, it says "cloudy," so it might be clouded.

Q. It was or maybe it was?

A. It was. I am not supposed to remember whether it was cloudy or sunny. It was a hot day.

Q. If it appears in your log it was cloudy, it must have been cloudy, isn't that the fact?

A. Of course.

Q. That warehouse that you speak of, Captain, is a stone warehouse, isn't it?

(Deposition of T. Ota.)

A. Almost exactly the same as the buildings you have in this port.

Q. Except the floor, cement?

A. Mostly wood, but a few cement floors, too.

Mr. KNIGHT.—Q. What are the sides of the building—wood; not the floor, but the sides?

A. Iron. [203]

Q. Iron sides?

A. Yes; it looks like iron; on the roof, galvanized tin, or iron.

Mr. McKEON.—Q. Captain, in receiving cargo aboard your ship is it or is it not customary to note on the bill of lading the condition of the cargo as to whether it is in bad condition or not?

A. I do think it is, but you understand that the captain has nothing to do with the bill of lading, nor signs any one of them. It is the freight clerk's business to attend to that.

Q. Do you know how many barrels were empty when you arrived here in San Francisco, Captain?

A. I do not know.

Q. Do you know whether any oil escaped from the barrels in No. 5, Captain?

A. What do you mean by escaped oil? I did not notice it until the discharging of the cargo at San Francisco.

Q. What was the question.

(Question read.)

A. I do not know whether any oil escaped from the barrels or not, but I noticed some stains and some oils on the floor.

(Deposition of T. Ota.)

Q. Well, upon arrival in San Francisco you found that this oil had escaped, didn't you?

A. Why, I am not positively sure whether it escaped or not. All I can say is that oil was perforating through the wood of the barrels. That is all I noticed.

Q. It went into No. 5 tank?

A. In didn't go inside of the hold No. 5.

Q. Where else would it go, Captain?

A. I mean by that that I personally did not go down.

Q. I am trying to find out where it would go.

Mr. KNIGHT.—I object to that question on the ground that he has already testified that anything that got out of hold No. 5 went through the scuppers and into the bilges and when the bilges got a certain depth it would be pumped overboard.
[204]

Mr. McKEON.—I want to get the course of it, just exactly where it would go. I will put the question this way:

Q. Were the scuppers that you speak of in the bottom of No. 5 on both the starboard and the port side of No. 5?

A. It could not be stopped. It is always open.

Q. I did not ask that. Will you read the question?

(Question read.)

A. Yes.

Q. Then, there was a space between the fresh-water tank and No. 5 tank; is that the fact?

(Deposition of T. Ota.)

A. Just about the place, not exactly.

Q. Well, there was a space there, wasn't there?

A. Yes.

Mr. KNIGHT.—A space between the fresh-water tanks and No. 5 tank?

A. Yes.

Mr. McKEON.—Q. On both the starboard and port sides.

A. Just both sides of the skin of the ship.

Mr. KNIGHT.—I do not think he understands it. You want to know if there is a space between the fresh-water tanks and No. 5?

Mr. McKEON.—Q. Captain, is there a space between the fresh-water tanks and No. 5—that is, is there a space between the fresh-water tanks and tank No. 5?

A. Yes.

Q. There is a space?

A. I don't know—barricaded by wood.

Mr. KNIGHT.—Q. There is a barricade, as you say, or a bulkhead of wood on each side?

A. Yes.

Q. And then there is a steel plate on each side, isn't that so? A. Yes, next to the tank.

Q. Next to what tank, the fresh-water or tank 5?

A. The fresh-water tank. [205]

Q. Here is the fresh-water tank, is that right?

A. Yes.

Q. Then comes steel bulkhead? A. No, wood.

Q. Then comes steel right next to it?

(Deposition of T. Ota.)

A. No, it is the fresh-water tank there, then the wood bulkhead.

Q. Then what, after wood bulkhead what?

A. Nothing.

Q. Then wood bulkhead between tank 5 and fresh-water tank, is that right? A. Yes.

Q. Is there wood bulkhead along on the other side of fresh-water tank? A. Yes.

Q. Then, is there any space between the fresh-water tank and this cargo tank?

A. Nothing at all except the wood bulkhead.

Q. What do you mean by a space?

A. There must be a space between the tank and the wood bulkhead.

Q. Between the tank and the wood bulkhead?

A. Yes.

Q. What is the tank lined with? A. Steel.

Q. Then, how much space is there between the steel and the wood bulkhead of this tank?

A. Why, I cannot tell any measurement, almost nothing.

Q. Inch or two inches or a foot or what?

A. About one or two inches.

Mr. McKEON.—Q. One or two inches between the steel tank and the wooden bulkhead?

A. Yes.

Q. And how wide is the wooden bulkhead?

A. Thickness—about two inches.

Q. And then is there a space between the wooden bulkhead and the steel fresh-water tank?

A. Not very much.

(Deposition of T. Ota.)

Q. There is a slight space? [206]

A. About a couple of sheets of paper, you can put in.

Q. A very slight space?

A. A very slight space.

Q. And that is true of both starboard and port side?

A. Yes, but I am not talking about the fore and aft end, but I am talking about the two sides.

Q. Then, if there were scuppers out of No. 5 tank, would they take care of any overflow of oil and carry it out through this space that you speak of between the fresh-water tank and No. 5 tank, or would they—strike that out. Put it this way, so that he can put it in his own language: Describe just where the scuppers were located on No. 5 tank.

Mr. KNIGHT.—I am going to object to that. He said they went down on the port and starboard side.

Mr. McKEON.—Q. Point it out here.

Mr. KNIGHT.—I think he has already gone into that.

Mr. McKEON.—Will you point out there?

A. (Witness indicates.)

Q. That is where it left No. 5 tank? A. Yes.

Q. Mark it with an "S" on the cargo plan; marked with an "S" for scuppers.

A. Not on this side.

Q. On one side; and does that pass down through the engine room; where does it drain?

A. The fresh-water tank is down below; this is

(Deposition of T. Ota.)

not the end of the fresh-water tank. The fresh-water tank goes down below, further than the floor of this No. 5 tank. Through the scuppers it leads into the bilges.

Q. Where are the bilges located with respect to the No. 5 tank?

A. Immediately opening into the bilges.

Q. But where is it located with respect to that?

A. In the shaft alley.

Mr. KNIGHT.—Q. Are there two scuppers there in that cargo tank? [207]

A. Yes, on both sides.

Mr. KNIGHT.—Then he wants to mark them on both sides. Anything further you want to ask?

Mr. McKEON.—I think not.

Mr. KNIGHT.—I have two or three questions to finish.

Redirect Examination.

Mr. KNIGHT.—Q. Captain, this little place here on the upper deck of the "Korea" which you said you could not place; isn't that the skylight of the engine-room?

A. Yes, I should think it is; I am very certain about it.

Q. Now, in the engine-room will you state whether or not the boilers are on the forward or aft end?

A. The boilers are situated somewhere around there. (Indicating.)

Q. Forward? A. Yes.

Q. State whether or not there has been any

(Deposition of T. Ota.)

change in the ventilating apparatus of that steamer from the time she made her voyage No. 4 to the present time? A. No.

Q. Now, by the term "engineers' quarters," when you were pointed to the position on the ship which is known as the thrust recess, what do you mean?

A. I mean the place where the engineers come in to get cool.

Q. And the engineers go to the thrust recess here to get cool, do they?

A. You must understand there is also a shaft present in that place.

Q. The shaft that goes through from the engine-room down to the propellers?

A. Yes. It is nothing but a space, vacant space.

Q. A great big space stretching from one side of the vessel to the other? A. Yes, sir. [208]

Q. And that is before the vessel is divided into two shaft alleys? A. Yes, that is the very place.

Q. Now, then, do the bilges collect all of the water and the liquid that comes from the washing of the decks and otherwise throughout the vessel?

A. With the exception of the very top deck all the waters and fluids and practically everything come down to the bilges.

Q. And are pumped from the bilges by the bilge pumps forward? A. Yes.

Q. Do you know, Captain—I am referring now to the door of each of the ventilators in this 5 hold, 5 tank—how high is the bottom of the door from the bottom of the floor?

(Deposition of T. Ota.)

A. About ten inches from the floor.

Mr. KNIGHT.—I think that is all.

Recross-examination.

Mr. McKEON.—Q. Captain, how often did you take the temperature of the fresh-water tank on this voyage?

A. I never took the temperature of the fresh water, but I always know about how much the temperature of the water is.

Q. But you never took it?

A. No. I want to add that it is a rule that the water in the fresh-water tank is always the same as the temperature of the sea water.

Q. You spoke on direct examination of the ice and the cold-storage plant being close to No. 5 hatch. You mean that it was on top of the main deck? A. It is about right here (indicating).

Q. I know it is right there, but I am trying to define the deck?

A. We call it the upper deck—no, main deck.
[209]

Deposition of Y. Iijima, for Claimant.

Direct Examination.

Mr. KNIGHT.—I gave a notice of the taking of the deposition of the first engineer, but it seems they have sent up the chief engineer instead; so, will you consent to taking the deposition of the chief instead?

Mr. McKEON.—Yes. The log-book is to remain in Mr. Knight's possession?

(Deposition of Y. Iijima.)

Mr. KNIGHT.—We will arrange for the log-book.

Will it be stipulated that it will be unnecessary to have each of these witnesses sign the depositions?

Mr. McKEON.—Yes.

Mr. KNIGHT.—And that the testimony of Mr. Y. Iijima may be taken under the notice *de bene esse* in the place of T. Miyamai, with the same force and effect as if he were specially designated in the notice.

Mr. McKEON.—Yes.

Mr. KNIGHT.—Q. Mr. Iijima, you are the chief engineer of the “Korea Maru,” are you not?

A. Yes, sir.

Q. How long have you been the chief engineer?

A. Just about eleven years.

Q. Were you chief engineer when the “Korea Maru” was in the service of the Pacific Mail Steamship Company? A. No, sir.

Q. Then how is it that you could have been chief engineer for eleven years? A. One year.

Q. One year?

A. Yes, sir. I joined the “Korea Maru” last August. [210]

Q. You joined the “Korea Maru” August of last year, so that I must have misunderstood your testimony. Will you state when the vessel is at sea ordinarily with her engines working about what is the temperature of the engine-room?

(Deposition of Y. Iijima.)

A. In the summer-time it was ninety to one hundred.

Q. And what is the temperature in the shaft alley? A. It is lower than that.

Q. What ordinarily would you say—how much cooler would the shaft alley be than the engine-room? A. Well, about five or six degrees.

Q. What would the shaft alley be ordinarily in the summer-time when the engines were working?

A. 85 to 95.

Q. Do you know what ventilators lead to the shaft alley? A. What?

Q. What ventilators lead to the shaft alley; do you know about the ventilation of the ship; are there ventilators leading down to the shaft alley from the upper deck right aft of the engine-room?

A. Aft and forward.

Q. I am not speaking of forward—right aft of the engine-room, will you state whether or not those go through No. 5 hold? A. Yes, sir.

Q. How does the air enter those ventilators, from above or below? A. Oh, from above.

Q. From above? A. Yes.

Q. Does it pass down through to the shaft alley?

A. Yes, sir.

Q. And passes through No. 5 hold?

A. Yes, No. 5 hold, too.

Q. No. 5 hold and the shaft alley.

Q. It goes through No. 5 to the shaft alley?

A. Yes, sir.

Q. State whether there are any ventilators in the

(Deposition of Y. Iijima.)

aft part of the [211] ship that lead to the shaft alley? A. Yes.

Q. Where are those ventilators, Chief?

A. Just above the thrust bearing.

Q. Where it is marked "thrust recess"?

A. Yes, sir.

Q. You have said there were two ventilators leading down through hold 5 to the thrust recess?

A. Yes, sir, through the ice chambers.

Q. They go through the ice chambers?

A. Yes, sir.

Q. Now, do you know whether or not any cold air comes down through the ice chamber down through that ventilator? A. Yes.

Q. Does cold air come down through the ventilator down through the ice chamber?

A. Yes, cold air.

Q. It comes down through the hold here and down through the thrust recess? A. Yes.

Q. Did you say two ventilators?

A. Yes, sir, a ventilator on each side.

Q. One port side and one starboard side?

A. Yes.

Q. Are there any other ventilators that lead down from the deck to the shaft alley? A. Yes.

Q. Whereabouts? A. About here.

Q. The witness points to the No. 7 hold.

A. No. 7 hold.

Q. And it comes down from the upper deck?

A. Yes, upper deck.

Q. Down to the shaft alley? A. Yes.

(Deposition of Y. Iijima.)

Q. How many ventilators, Chief?

A. One on each side.

Q. One on each side?

A. Yes, they are big ones.

Q. Big enough for man to go through?

A. Yes.

Q. Down the ladder? A. Yes.

Q. Do firemen come down from the deck by that ladder? [212] A. Yes.

Q. Why do they come down that way?

A. In stormy weather.

Q. In stormy weather?

A. In stormy weather they cannot pass the ship's side, one side.

Q. The one side the cabin goes out to the skin of the ship? A. Yes.

Q. They cannot go by there? A. Yes.

Q. So that the firemen come down through this ventilator? A. Yes.

Q. And there is one on port and one on star-board side? A. Yes.

Q. How does the air get into the shaft alley?

A. The shaft alley here?

Q. How does the air get in; does the air come down the shaft alley and go in or does the air come down from the top and go in?

A. From the top it goes in.

Q. Where does the air go to when the air comes down to the shaft alley?

A. It goes to the engine-room.

Q. Cold air come in here?

(Deposition of Y. Iijima.)

A. Yes, and when the wind blows it goes down through the ventilator and into the shaft.

Q. Why, if that air comes in from the outside to the shaft alley, why is the shaft alley only five degrees less or so in temperature than the engine-room?

A. You must understand that the temperature in the engine-room is all different, from bottom, middle and top; everybody knows that, and in the bottom of the place where the cold air comes through the shaft alley is always cool and much cooler than any other portion in the engine-room.

Q. When you told me the temperature in the engine-room was from 90 to 100 degrees what part of the engine-room were you referring [213] to?

A. About here—90 degrees.

Q. Well, 90 degrees, that is in the forward part of the engine-room? A. Yes.

Q. What is the temperature in the aft part of the engine-room?

A. Not much difference. From 'tween-decks it is a little bit hotter.

Q. I will go back to my question that I asked: If so much cold air goes down to the shaft alley why is not the shaft alley much cooler than the engine-room?

A. This is the place where all fresh and cool air comes in—the shaft alley—and no steam is present, and therefore it is cool.

Q. Does any steam get into the shaft alley?

A. No.

(Deposition of Y. Iijima.)

Q. Well, I will again ask the question: Why if there is no steam that goes into the shaft alley, and if there is this fresh air that goes into it, why isn't it very much cooler than the engine-room?

A. You understand that it must be according to the temperature and the atmosphere is always kept in here.

Q. Kept in the engine-room?

A. Yes, and the atmosphere is about 85 and 90 degrees, and therefore the engine-room in the bottom is very much different with the shaft alley.

Q. In other words, the temperature of the engine-room is virtually the temperature of the outside?

A. Yes.

Q. And the air coming in from the outside into the shaft alley makes the temperature of the shaft alley—

A. No, the shaft alley is much cooler, but around here in the bottom much cooler.

Q. You say "much cooler"; what do you mean by much cooler?

A. I should think there is not very much difference, excepting five or six degrees in the bottom of this engine-room and the shaft alley.

Q. Where is the ice-making plant?

A. Right here (indicating). [214]

Q. The ice-making plant is over—here is tank 5, here is the engine-room, here are the fresh-water tanks; the ice-making plant is just over the hold 5 which we call tank 5?

A. The machine is in the engine-room.

(Deposition of Y. Iijima.)

Q. No, it is not there. It is away over here. As a matter of fact, do you know this is the engine-room? A. Yes.

Q. Where in the engine-room is this?

A. That is the place where the ice-making engine is (indicating).

Q. Up in that corner?

A. I will explain by other—this drawing is not very good; it is confusing.

Q. Think the thing over, and where to the best of your recollection and knowledge is that ice-making machine? If you do not know, say you do not know. A. Outside of the cold storage.

Q. Where outside of the cold storage? Well, no matter; if you do not know. Now, let me ask you one further question: How is that engine-room ventilated?

A. There is a ventilator just in here.

Q. A big skylight? A. Yes, and also a tube.

Q. The tube that leads down?

A. Yes, made with steel, with pipe.

Q. Well, I do not know that I want to ask any further questions.

Cross-examination.

Mr. McKEON.—Q. Chief, you say the bottom of the engine-room is cooler than the top of the engine-room? A. Yes, sir.

Q. Take the position opposite the place designated on this blue-print as "Tank No. 5"; that is hotter than it is down at the bottom of the engine-room, isn't it—up here? A. Yes, hotter.

(Deposition of Y. Iijima.)

Q. Hotter? A. Yes, hotter right here. [215]

Q. And on top—do you know anything about what is on top of No. 5 tank? A. It is a hold.

Q. A cargo hold? A. Yes.

Q. And then on top of that is your cold storage?

A. Yes, cold storage.

Q. And that is about eight or ten feet on top of No. 5 hold? A. No, No. 5 tank.

Q. No. 5 tank here?

A. No; No. 5 tank is here; No. 5 hold, you mean?

Q. No. 5 hold—eight or ten feet on top of that.

A. That is on top of No. 5 hold.

Q. Is it directly on top of No. 5 hold, or is it eight or ten feet on top of No. 5 hold? This is No. 5 right here. This is a cargo compartment. What is the difference between the top of this No. 5 and the bottom of this cold storage?

A. About eight feet—the room between decks. This side eight feet high—seven feet, and to the top it is eight feet.

Q. It is hotter around the engine-room than it is any other place around the ship, isn't it?

A. No, not so.

Q. It is not? A. No. This part is very cool.

Q. The bottom is cool?

A. Yes, the bottom is cool.

Q. Is it hotter on the after part of the engine-room than it is any other place on board ship?

Mr. KNIGHT.—Q. Where is the hottest part of the ship, in other words?

A. It is hot in here.

(Deposition of Y. Iijima.)

Mr. KNIGHT.—Under the smokestack that is aft.

Mr. McKEON.—Q. Is it hotter immediately abaft the engine-room than it is over here in No. 7 hold?

Mr. KNIGHT.—What are you referring to—are you referring to [216] the engine-room itself?

Mr. McKEON.—I am saying immediately abaft the engine-room.

A. Not much difference.

Q. Not much difference?

A. No, by reason of the insulation.

Q. Now, is it hotter right at the place that I am holding my finger at, the engine-room right in front of No. 5 tank, than it is in No. 7?

A. In the engine-room the most hot place.

Mr. McKEON.—I move to strike that out as not responsive to the question.

Q. I am asking you the difference between this place and this place here.

A. No, not much difference.

Q. And is there any difference between No. 7 and the shaft alley?

A. Yes, I think there is a little difference.

Q. There is? A. Yes.

Q. What is the difference?

A. Shaft alley is cooler.

Q. And the shaft alley is cooler than the engine-room? A. Yes.

Q. Upon direct examination you testified that the average temperature in the engine-rooms was 95 to 100? A. Yes.

Q. You do not mean by that that the average tem-

(Deposition of Y. Iijima.)

perature in the engine-room on the "Korea Maru" at all times is 95 or 100?

A. In the summer-time.

Q. In the summer-time? A. Yes.

Q. On a voyage over from Manila to San Francisco, Chief, in the summer-time, do you or do you not expect to have your engine-room hot?

A. Yes; it is hotter than any other season.

Redirect Examination.

Mr. KNIGHT.—Q. There are only two questions I want to ask: [217] Where are your boilers, Chief? A. Forward of the engine-room.

Q. And was your cold-storage plant in operation and did it contain ice on your voyage 4?

Mr. McKEON.—He was not on voyage 4; he said he joined in August, 1917.

Mr. KNIGHT.—Q. Was it 1917?

A. No, 1916.

Q. Then you mean to say that you have been chief engineer of the vessel since August, 1916; you were chief engineer then on voyage 4? A. Yes.

Q. And was your cold storage plant in operation and containing ice on that voyage? A. Yes.

Mr. KNIGHT.—That is all. [218]

Deposition of Y. Yamamura, for Claimant.

Direct Examination.

Mr. KNIGHT.—Q. You are about to go to sea, are you not, on Wednesday, on the "Korea"?

A. Yes, sir.

Q. And you go with the chief engineer?

(Deposition of Y. Yamamura.)

A. Yes.

Q. He goes too? A. Yes.

Q. Do you know these two tanks; do you know this cargo—what we have been referring to as cargo tank 5? A. Yes.

Q. And hold 7? A. Yes.

Q. They are the two holds where the cocoanut oil was stowed on voyage 4, homeward voyage 4; you know those two tanks?

A. Yes, I know them.

Q. Is there any difference in the temperature of hold 5 from the hold 7?

A. I do not know exactly. I have joined the ship only lately, but I hardly believe the temperature in those two tanks would be the same.

Q. What did you say; I did not quite get your answer; you say you hardly believe that they are the same?

A. Yes, I believe.

Q. You believe that they are the same or are not the same? A. Are the same.

Q. You believe that they are the same?

A. Yes.

Mr. McKEON.—Q. Did you ever compare them, the temperatures in the two of them? A. No.

Mr. McKEON.—That is all.

Mr. KNIGHT.—That is all. [219]

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

I, John E. Manders, a notary public in and for

the City and County of San Francisco, State of California, do hereby certify that pursuant to the annexed notices, issued and served in the above-entitled cause, I was attended at the office of Samuel Knight, Esq., No. 1306 Hobart Building, No. 582 Market Street, in the City and County of San Francisco, State of California, by Samuel Knight, Esq., proctor for the claimant herein, and also by Joseph B. McKeon, Esq., representing Messrs. McCutchen, Olney & Willard, Proctors for the Libelants, on the day and date hereinbefore stated; that the aforementioned witnesses, T. Ota, Y. Iijima and Y. Yamamura, who were of sound mind and lawful age, were by me first carefully examined and cautioned and duly sworn to testify the whole truth and nothing but the truth, through said interpreter, P. M. Miyasaki, who had previously been duly sworn as interpreter in these proceedings; and said witnesses thereupon testified and proceedings were had as above shown; and the said depositions were, by Erwin M. Cooper, a stenographer and disinterested person, reduced to writing under my supervision, the reading over and signing of same by the said witnesses having been waived, as per stipulation hereinbefore in this record set forth, and were taken at the place in the annexed notices specified and at the time set forth.

I further certify that the reason for taking said depositions was and is, and the fact was and is, that all of the deponents are about to go to sea more than 100 miles from the place where the said action

is appointed by law to be tried; that I am neither of counsel nor attorney to either of the parties to said suit, nor interested in the event of said cause; and that I have retained the said depositions in my possession for the purpose of delivering [220] the same with my own hand to the clerk of the Southern Division of the United States District Court in and for the Northern District of California, the Court for which the same were taken.

I further certify that the exhibits attached to said depositions, marked by me respectively, "Claimant's Exhibits Nos. 1' and 2," are the exhibits referred to and used in connection with said depositions.

IN WITNESS WHEREOF, I have hereunto subscribed my name and attached my official seal at my office in the City and County of San Francisco, State of California, this 28th day of January, 1918.

[Seal]

JOHN E. MANDERS,

Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires January 26th, 1919.

[Endorsed]: Filed Mar. 29, 1919. W. B. Maling,
Clerk. By Lyle S. Morris, Deputy Clerk. [221]

In the Southern Division of the United States District Court in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,302.

CHARLES D. WILLITS and I. L. PATTERSON,
Copartners, Doing Business Under the Firm
Name of WILLITS & PATTERSON,
Libelants,

vs.

The Japanese Steamship "KOREA MARU," Her
Engines, Boilers, Boats, Tackle, Apparel,
etc.,

Respondents.

TOYO KISEN KAISHA, a Corporation,
Claimant.

APPEARANCES.

J. B. McKEON, Esq., for the Libelants.

F. B. BOLAND, Esq., for the Respondents.

**Testimony Taken Before Francis Krull, United
States Commissioner, on Reference.**

Monday, March 28th, 1918. [222]

Testimony of Chiyokichi Ito, for Respondent.

CHIYOKICHI ITO, called for the respondent, through the interpreter, H. Ishikawa, having been duly sworn, testified as follows:

Mr. BOLAND.—Q. What do you do?

A. I am a carpenter.

Q. On the "Korea Maru"? A. Yes.

(Testimony of Chiyokichi Ito.)

Q. How long? A. For about three years.

Q. Do you do soundings? A. Yes.

Q. Do you do soundings in the engine-room bilge? A. Yes, I do.

Q. Ask him whether hold 5 drains into the engine-room bilge. A. Yes, I know.

Q. Ask him if it does.

A. Yes, I know it does.

Q. How often do you sound the engine-room bilge? A. Morning and night; every day.

Q. If you know, how often is the engine-room bilge pumped out?

A. About five or six times during the day.

Q. When he sounds the engine-room bilge, does he ever notice any oil on the sounding-rod?

A. Yes, I can tell.

Q. Ask him if he notices oil on the sounding-rod when he sounds the engine-room bilge.

Mr. McKEON.—Of course, the answer to that question depends upon whether there is any oil in the bilge.

A. Well, I can see what it is.

Mr. BOLAND.—Q. What I want him to answer is that question. You put it so he understands it, Mr. Interpreter. A. I can see; yes.

Q. He can see it? A. Yes.

Q. Does he always find oil on the sounding-rod in the engine-room bilge? A. Yes.

Q. Where does the oil come from?

A. That is from the engine-room.

Q. What kind of oil? [223]

(Testimony of Chiyokichi Ito.)

A. Whitish, and kind of foam on it.

Q. Is it cylinder oil?

A. Yes; cylinder oil and engine oil.

Mr. BOLAND.—That is all.

Cross-examination.

Mr. McKEON.—Q. Don't you, on your ship, save the drainage from your engine oil and use it for other purposes?

A. I never use it for any purpose at all.

Q. Do you save your cylinder oil at all after it is used on the engines? A. Never use it.

Q. Have you ever used it on any ship you have ever been on?

A. If we get any oil from the engine-room in the bilge we never use it.

Q. How many bilges on the "Korea Maru" are used for the drainage of the engine-room?

A. Just the two.

Q. What is the number of the bilges?

A. 9 and 10.

Q. Does No. 10 take care of the drainage from No. 5 tank abaft the engine-room?

A. Yes, No. 10 bilge is located on the No. 5 hatch.

Q. And takes care of the leakage from No. 5 tank—in No. 5 hatch?

A. The location of No. 5 tank is an entirely different locality.

Q. No. 5 tank is in No. 5 hatch, is it not?

A. No.

Q. It is not? A. No.

Q. Do you know what No. 5 tank is on the

(Testimony of Chiyokichi Ito.)

“Korea Maru”? A. I know.

Q. Where is it located?

A. It is right under our baggage-room.

Q. Isn't there a hatch in No. 5 hold where cargo is sometimes stowed immediately abaft the engine-room, known as No. 5 tank?

A. No. 5 tank is not located in No. 5 hatch. [224]

Q. Were you on the ship at the time the cocoanut oil was stowed in No. 5 tank and was badly damaged?

A. To my knowledge, I don't know whether they put oil in No. 5 tank.

Q. You know where No. 5 hatch is on the ship, don't you? A. Yes, I know.

Q. In No. 5 hatch, do you know where the water-tanks are? A. Yes.

Q. Do you know that between the water-tanks, and immediately abaft the engine-room, there is a square tank?

A. There is no tank, but I know there is one orlop hold.

Q. That is on top of a portion of the engine-room?

A. Yes.

Q. It is not on top of the engine-room?

A. That is on top of the orlop hatch—it is located on the shaft tunnel, not on the engine-room.

Q. What do you call the thrust recess?

The INTERPRETER.—I couldn't understand that myself.

Q. Never mind what you understand. You just

(Testimony of Chiyokichi Ito.)

repeat the question: What do you call a thrust recess?

The INTERPRETER.—I cannot understand—I don't know what that is.

Q. You ask the question of him and he will know.

The INTERPRETER.—I cannot translate it in the first place, the thrust recess.

Q. Can't you put thrust recess in Japanese?

The INTERPRETER.—I don't know.

Mr. McKEON.—So that there will be no misunderstanding as to what we are talking about now, the thrust recess is immediately under the No. 5 tank and is a part of the engine-room, and this orlop tank described by the witness is on top of the thrust recess. [225]

Q. What bilge drains that orlop compartment that you have just talked about?

A. That No. 10 bilge.

Q. How deep are your engine-room bilges?

A. About four feet.

Q. About four feet? A. Yes.

Mr. McKEON.—I think that is all.

Mr. BOLAND.—If there is engine oil in the bilge and cocoanut oil in the bilge, can you tell the difference on the sounding-rod?

A. I can't distinguish. [226]

Thursday, April 3, 1919.

Testimony of Benjamin Free, for Respondent.

BENJAMIN FREE, called for the respondent, sworn.

Mr. BOLAND.—Q. Mr. Free, what is your busi-

(Testimony of Benjamin Free.)

ness? A. Consulting engineer.

Q. What kind of engineer? A. Marine.

Q. Do you know the "Korea Maru"? A. Yes.

Q. Did you ever have any experience with that vessel?

A. Being assistant superintending engineer on the Pacific Mail dock she came under my jurisdiction.

Q. When was that? A. In 1917.

Q. Did you ever sail on her too?

A. As a junior engineer, but I would leave that out.

Q. You have sailed on her? A. Yes.

Mr. McKEON.—Q. When did you sail on her?

A. On 1916.

Mr. BOLAND.—Q. You visited the vessel lately, too, did you not? A. Yes.

Q. When? A. Saturday, March 29th.

Q. Will you describe from your recollection the relation of hold or tank 5 so-called to the engine-room and the outside of the ship?

A. No. 5 tank consists of mostly the recess of the shaft alley, with each side of this recess taken up by fresh-water tanks.

Q. It extends to the skin of the ship, does it?

A. No.

Q. Where is it cut off?

A. It is right in the center of the vessel leaving these two fresh-water tanks to come on each side of it.

Q. What is between tank 5 and the skin of the ship? A. Fresh-water tank. [227]

(Testimony of Benjamin Free.)

Q. Are there any bulkheads? A. No.

Q. I mean steel bulkheads?

A. No; there is a temporary wooden bulkhead.

Q. Then with the exception of these fresh-water tanks, 5 tank does extend to the skin of the ship?

A. Yes.

Q. What are those fresh-water tanks used for?

A. Drinking purposes.

Q. Is condensed water ever put in there?

A. No.

Q. Where does the water come from and where does it go to?

A. It comes from the city tanks, from the port of call, and is pumped up to a service tank on top of the house; this service tank supplies the fresh water to the baths and galley.

Q. That is for the purpose of pressure?

A. Pressure, a gravity system.

Q. Where is the condensed water put?

A. Into the condenser and into the hot well.

Q. Why is the condensed water not put into this tank?

A. Because it is poisonous, from using foreign matters in the boilers.

Q. Boiler compound, etc.?

A. Boiler compound, etc.

Q. What is the location of this tank 5 with reference to the engine-room?

A. It is abaft the engine-room.

Q. Separated by steel bulkheads?

A. By steel water-tight bulkheads.

(Testimony of Benjamin Free.)

Q. What is it just above, just immediately above?

A. Immediately above the shaft alley recess.

Q. Often called the thrust recess.

Q. How far down do these fresh-water tanks go?

A. To the top of the tank tops.

Q. How far down in that vessel do they go?

A. To the [228] bottom, within four feet of the skin.

Q. They go down, then, alongside of the thrust recess, do they? A. Yes.

Q. Where are the scuppers in No. 5 tank?

A. Aft of the after end of No. 5 tank, underneath the fresh-water tanks.

Q. Where does the waste go from No. 5 tank? Describe where it goes and how it goes into the bilges, and what bilges it goes into.

A. It drains from the scuppers from the 'tween-decks and all up deck down on to the tank tops and underneath the fresh-water tanks to a scupper leading into No. 10 bilge.

Q. Where is No. 10 bilge?

A. Aft of the engine-room.

Q. Does the waste drainage go to the skin of the ship at all? A. No.

Q. It goes right down alongside—

A. (Intg.) The recess.

Q. The recess? A. Yes.

Q. Does it go through a pipe at any point?

A. No; only on the skin of the ship; there is a girder running along the ship's side for stiffening, where the sweat from the difference between the

(Testimony of Benjamin Free.)

temperature between the inner and outer holds drains along a gutter-way there and down through a scupper pipe into the top of the tank top and that flows over into the scupper in No. 10 bilge.

Q. But all the drainage does not necessarily go through that place you speak of? A. No.

Mr. McKEON.—Q. You refer to tank tops; you mean the double bottoms? A. Yes.

Mr. BOLAND.—Q. Is there any place between these scuppers and the bilge where the drainage from No. 5 tank could be plugged up?

A. No, sir. [229]

Q. Is there any manhole from the thrust recess or engine-room into No. 10 bilge? A. Yes.

Q. Where is it?

A. It is over the top of bilge 10, about the thrust bearing.

Q. Is that ever taken off during a voyage?

A. Very seldom.

Q. Why?

A. It is only taken off in case the bilges or the suction pipe blocks up.

Q. It is taken off in port, is it? A. Yes.

Q. Why is it taken off in port?

A. To clean the bilges.

Q. Otherwise it is not? A. No.

Q. Is it possible to go through the manhole into the bilge? A. Yes.

Q. How could you do it?

A. Well, by removing this plate you could step into the bilge, if there is no water in there.

(Testimony of Benjamin Free.)

Q. If you go through the manhole don't you go into where the fresh-water tanks are?

A. No, not over the bilge; there is a manhole on the bulkhead leading into No. 5 hold; that is the one you are referring to. There are two manholes; there is one over the bilge itself so that you can get down to the strainer, and the other leads into No. 5 hold.

Q. Does the engine-room drain into the same bilge as No. 5 hold? A. Yes.

Q. No. 5 tank? A. Yes, into bilge 10.

Q. Where does the No. 7 hold drain?

A. Aft of the shaft alley into bilge 10.

Q. Does any oil from the engine-room or the shaft alley drain into these two bilges, 10 and 11?

A. Yes.

Q. Where does it come from?

A. Splashing from the main engine, from the thrust bearing and spring bearing of the shaft alley; there is a wick feed that keeps constantly feeding all [230] the time.

Q. Are those two bilges pumped during the voyage, and if so how constantly are they pumped?

A. They are pumped every four hours.

Mr. McKEON.—On what voyage?

Mr. BOLAND.—On any voyage.

A. On any voyage—

Mr. McKEON.—Q. You were not on the voyage on which the "Korea Maru" came in with this cocoanut oil? A. No.

Mr. McKEON—I object to that question as im-

(Testimony of Benjamin Free.)

material, irrelevant and incompetent.

Mr. BOLAND.—Q. Could they stop pumping the bilges of that vessel at any time?

A. No, because the waste water from the main engine leads into No. 10 bilge.

Q. What would be the result if they stopped?

A. Overflow.

Q. That is the same of 10 and 11, is it?

A. Yes, leakage from No. 11 from the stern gland would overflow No. 11 bilge.

Q. Did you ever see the sounding of these bilges?

A. Yes.

Mr. McKEON.—At what time?

Mr. BOLAND.—At any time.

A. At any times, at all times.

Q. You have seen the soundings? A. Yes.

Q. Did you ever see oil on the sounding-rods?

A. Always.

Q. Is that so on every vessel?

A. On every vessel.

Q. That is the engine-room bilges? A. Yes.

Q. Why is that?

A. Because the leakage from the main engine or spring bearing to the shaft alley drains over the tank tops into these bilges.

Q. Assume that there is also in the bilges coconut oil so [231] that there is this other oil that you have just mentioned, could you tell the difference on the sounding-rod between the one and the other? A. No.

Q. What temperature does the engine-room of the

(Testimony of Benjamin Free.)

“Korea Maru” reach on a voyage, assuming a voyage from Manila? A. About 115.

Q. Is that the maximum.

A. About the maximum.

Q. Could you tell what the relative temperature between the engine-room and No. 5 tank would be on a similar voyage?

A. About 15 degrees—15 or 20.

Q. It would be cooler? A. Cooler.

Q. No. 5 tank would be 15 or 20 degrees cooler?

A. Yes.

Q. Can you tell why that would be?

A. There are no steam-pipes, no heat going through there, like the steam lines and auxiliary steam lines in the main engines, etc., in the main engine-room.

Q. What, if anything, would tend to cool No. 5 tank, too?

A. The ship's water—the drinking water-tank would have a tendency to cool it, and the outside splash of the ocean water, the sea water.

Q. Would the fact that there is heat adjoining the No. 5 tank and that there is cool water in the wings and also the sea water at the side tend to make any moisture in that hold?

A. It would create the action of sweating.

Q. Sweating in that hold? A. Yes.

Q. It would congeal the moisture?

A. Congeal the moisture.

Q. And make it settle? A. Yes.

Q. Are there any empty tanks under the engine-room? A. No.

(Testimony of Benjamin Free.)

Q. What are those tanks used for?

A. For boiler feed.

Mr. BOLAND.—That is all. [232]

Cross-examination.

Mr. McKEON.—Q. No. 5 tank you say is in the center of the ship? A. Yes.

Q. And it has dividing the fresh-water tanks wooden bulkheads?

A. No; the recess from the shaft alley divides the water-tanks.

Q. I am not talking about that. No. 5 tank has a floor in it, a steel floor, hasn't it? A. Yes.

Q. That steel floor is above the thrust recess, is it not? A. Yes.

Q. Then there is a steel bulkhead separating it from the engine-room? A. Yes.

Q. Then on the other end of it, further aft, is another steel bulkhead separating it from the next cargo compartment? A. Yes.

Q. On both the port and starboard sides there is a wooden bulkhead separating that compartment from the steel tanks? A. Yes.

Q. So that No. 5 tank, confining it to that square, which we have described, is completely enclosed?

A. Enclosed, yes.

Q. How far away from the bulkhead, the wooden bulkhead and No. 5 tank on either side of the ship, is the skin of the ship?

A. I should judge about 25 feet.

Q. On each side? A. Yes.

Q. And in your judgment the sea water touching

(Testimony of Benjamin Free.)

the skin of the ship 25 feet away from that wooden bulkhead is going to have an effect on the heat of No. 5 tank?

A. With the radiation from the fresh-water tanks that are close up to this wooden bulkhead.

Q. Answer the question whether it will or not in your opinion? A. Yes, it will. [233]

Q. A pipe drains from No. 5 tank into the bilge, does it not? A. No pipes.

Q. It passes from the scuppers into a pipe and down the skin of the ship into the bilge, doesn't it?

A. That is only on the girder, what they call a girder for stiffening which runs along the skin of the ship.

Q. We have the bottom of No. 5 tank, haven't we? A. Yes.

Q. A steel tank? A. Yes.

Q. The seepage from that tank passes where?

Q. Underneath the fresh-water tanks?

A. Underneath the fresh-water tanks.

A. Yes.

Q. From there, where does it go?

A. To a scupper into No. 10 bilge.

Q. Does it in that course pass through any pipe whatsoever? A. No, sir.

Q. What pipe enters into the bilge—where does it enter into the rose-box?

A. Right under the tank.

Q. Is there a pipe in the rose-box?

A. No; there is a rose-box over the top of this hold; it drains right into the bilge.

(Testimony of Benjamin Free.)

Q. Does that drainage go in there in a large opening, or through some pipe?

A. No pipe at all.

Q. How does it get in there, just flow in through a nozzle?

A. Through the tank tops—over the tank tops, and there is a hole in the tank top, and over the top of the hold is the rose-box to protect it, to let in no sticks or foreign matter, to go down with the seepage—so it won't stop the rose-box up—that is really down in the suction pipe.

Q. How many voyages have you ever made on the "Korea Maru" as junior engineer?

A. One; that is mostly around the bay, the city here. [234]

Q. Around the bay? A. Yes.

Q. Where was that voyage?

A. Around the city here, around from the Quarantine Station to Hunters Point drydock, and then I had charge of the ship from the dock to the drydock.

Q. On that trip from Hunters Point drydock, did you personally take soundings?

A. No, but I was there when they took soundings; the assistant to the junior on watch always takes them.

Q. Where were you going from Hunters Point?

A. Taking her to the quarantine ground.

Q. What period of the day was that?

A. Three o'clock in the afternoon.

Q. To when? A. Till 4:30.

Q. An hour and a half? A. Yes.

(Testimony of Benjamin Free.)

Q. Was the ship loaded? A. Yes.

Q. How did you happen to go out there to join her? She was coming in, I suppose, at that time?

A. Yes.

Q. How did you happen to go out to join her?

A. The assistant superintending engineer always has to go out and join the ship—on every voyage he had to go over all the requisitions for repairs, and go over all the repairs.

Q. So that that hour and a half that you spent going from the Quarantine Station to Hunters Point is the extent of your experience with the “Korea Maru” under way?

A. No, that is only one day; I have joined her every voyage as she came in and done the same thing.

Q. In that way, that has been your experience?

A. Yes.

Q. You did that several times?

A. I did it for a year and seven months.

Q. What is the customary time of taking soundings aboard ship? [235]

A. With the engineers, at the end of every watch.

Q. What are the watches?

A. Every four hours they change watch and the carpenter on deck sounds at six in the morning and six at night; he sounds the holds and the engineer sounds in the fire-room and the engine-room.

Q. Now, what is the leakage that ordinarily gets into the bilges from the engine-room?

(Testimony of Benjamin Free.)

A. Whatever waste water you have from the main engine, the cooling water.

Q. What oil leakage?

A. Whatever splash there is from the main engine and thrust bearing.

Q. That is minor, is it not?

A. It is enough to accumulate in there.

Q. Enough to accumulate? A. Yes.

Q. There is not any quantity of oil, is there? There is not two feet of oil from that, is there?

A. Oh, no. It would accumulate in a day. They use two gallons a watch, or two and a half gallons on each engine; that works off the engine and drains down into the bilge, and that is mixed with the circulating water that goes through the guides of the main engine and drains back into the 10 bilge.

Q. The greatest quantity of the seepage from the engine-room goes into 9 bilge? A. No. 9 and 10.

Q. 9 and 10? A. Yes.

Q. Which takes the most?

A. According to the trim of the ship.

Q. If she is down by the head, it is going into 9?

A. 9, more. It has to flow over the top of the tank tops either way to get into either bilge.

Redirect Examination.

Mr. BOLAND.—Q. What does the deck officer have to do with the engine-room?

A. Nothing, whatsoever. [236]

Q. How often, ordinarily, does he go down into the engine-room?

(Testimony of Benjamin Free.)

A. I never saw him down there in any ship I have ever sailed on.

Recross-examination.

Mr. McKEON.—Q. You don't know whether it is the duty of the first officer to make an inspection of every one of the bilges on any ship, after the completion of every voyage?

A. He has nothing whatsoever to do with the engine-room, as to any Pacific Mail vessel I have been on.

Q. Do you know whether it is the duty of the chief officer of the ship to make an examination of the bilges on every ship he sails on?

A. Never, outside of his own department—never in the engine-room or fire-room. There is no sounding-pipe from the engine-room or fire-room leading up onto the main deck, where the ship's carpenter, or mate, or anybody else could sound; always taken care of by the engineers down below in every vessel, every American vessel.

Mr. McKEON.—That is all.

**Testimony of W. J. Murray, for Respondent
(Recalled).**

W. J. MURRAY, recalled for the respondent.

Mr. BOLAND.—You heard the testimony of Mr. Free, did you, Mr. Murray? A. Yes.

Q. And from it you gathered the relation of hold or tank 5 to the engine-room and the skin of the ship, etc.? A. Yes.

Q. You also heard Mr. McKeon's cross-examina-

(Testimony of W. J. Murray.)

tion with reference to hold 6 being abaft tank 5?

A. Yes.

Q. Hold 7 is immediately abaft that, again, on the "Korea Maru"? A. Yes.

Q. That is already in evidence. A. Yes. [237]

Q. From what you know of the case, and your testimony the other day, and what you have heard to-day, will you please tell us whether, in your judgment, tank 5 was a proper place to stow coconut oil? A. Yes, I do consider it proper.

Q. Will you explain why?

A. Well, it is abaft the engine-room; you have got the radiation of the sea water on the shell plating, and having the effect of the fresh-water tanks as to the temperature of that space between the wooden bulkhead of No. 5 and the shell plating.

Q. What effect of the condenser that was spoken of by Mr. Free, if any, would there be?

A. I should say there would be a beneficial effect on barrels.

Q. In what respect?

A. To prevent their drying out.

Q. Your answers assume that the containers were sufficient—that the containers in which the oil was placed in the hold were sufficient?

A. Sufficient.

Q. That is a proper place to stow if the containers are sufficient? A. Yes.

Q. Assume, Mr. Murray, that the cargo of coconut oil stowed in barrels in both hold 5 and hold 7, some of them came out empty, some partially empty,

(Testimony of W. J. Murray.)

and some full, what explanation would you give for that?

Mr. McKEON.—I object to that on the ground the witness is not qualified to pass upon it.

Mr. BOLAND.—He qualified the other day.

Mr. McKEON.—I don't think he did, and I interpose my objection to it.

Mr. BOLAND.—Will you explain that, Mr. Murray?

A. That the barrels that retained their contents possessed sufficient strength for the purpose for which they were intended, and those that did not retain their contents lacked the strength. [238]

Q. It may be that some of them dried out more than others?

Mr. McKEON.—I object to that on the ground it is leading and suggestive.

Mr. BOLAND.—I withdraw the question.

Q. Will you go on and explain how that might be, Mr. Murray?

A. That it is a fact is based on the experience that I have had that—

Mr. McKEON.—I object to the answer being based on the experience he has had on the ground it is not the opinion of an expert.

Mr. BOLAND.—Proceed.

A. That the barrels were found there, some partially full, others empty, and others apparently entirely full, in my opinion is evidence that some of the barrels contained the requisite strength in all parts, some of them only in parts, and some of

(Testimony of W. J. Murray.)

them lacked the strength where they needed it most.

Mr. BOLAND.—That is all.

Cross-examination.

Mr. McKEON.—Your answer as to tank 5 being a proper place for stowage of cocoanut oil in barrels, loaded to capacity, includes the fact that it was absolutely air-tight and no ventilation in there, does it? A. That the hold is closed?

Q. Absolutely air-tight and no ventilation in there.

A. No ventilation in there?

Q. You said that any compartment that is air-tight and gets no ventilation is a good place for the stowage of cocoanut oil?

A. According to its construction, as I have heard it defined here, there was a space between the shell plating and the bulkhead, and there was a space there for radiation of the lower temperature created by the action of the sea water on the shell [239] plating.

Q. You understand that this tank 5 is a square tank, the bottom of it is steel, the bulkheads fore-and-aft are steel, the side bulkheads are of timbers, made tight, and it being practically a square compartment, and being located approximately 25 or 35 feet on each side away from the skin of the ship, and being covered over on top completely so that there is no air whatever getting into the compartment, and one of the bulkheads separating it from the engine-room?

A. Do I understand you that that wooden bulkhead is an air-tight construction?

(Testimony of W. J. Murray.)

Q. Yes.

A. Then, if that is a fact, I should say that the radiation of the sea water would have very little effect there.

Q. Would you then say that is a proper place for the stowage of cocoanut oil?

A. If that wooden bulkhead is practically air-tight, then the effect of that radiation that I spoke of, assumed that this bulkhead was what we term a wooden bulkhead, a temporary affair, where there is a chance for the circulation of air; if it is absolutely an air-tight bulkhead, I could not consider that—

Q. (Intg.) That a proper place for the stowage of cocoanut oil?

A. I could not consider that a proper place for stowage of it.

Redirect Examination.

Mr. BOLAND.—Going back to the last question I asked you, if some of the barrels came out full of oil, some partially empty, and some entirely empty, from both holds 5 and 7, and it being admitted that hold 7 was a proper place for the stowage of cocoanut oil, wouldn't that indicate to you that hold 5 was a proper place to stow the cocoanut oil in?

A. A proper place to stow the cocoanut oil in, in view of the fact that some of the barrels came out partly full, some empty, and some full, but [240] if it is an actual air-tight compartment there, without being so constructed as to be affected by the radiation of the sea water on the shell plating—that

(Testimony of Lebeus Curtis.)

is created in that space between the shell plating and that bulkhead—I would not consider it an advisable place.

Mr. BOLAND.—That is all.

Mr. McKEON.—That is all.

**Testimony of Lebeus Curtis, for Respondent
(Recalled).**

LEBEUS CURTIS, recalled for the respondent.

Mr. BOLAND.—Q. Referring back to your testimony the other day, Captain Curtis, do you think that hold 5 on the “Korea Maru” was a proper place to stow cocoanut oil?

A. Yes, if the containers are good enough.

Q. If a cargo of cocoanut oil comes out of holds 5 and 7, some with the barrels full, some empty, and some partially full, what does that indicate, in your mind?

A. That some of the containers were not good enough.

Mr. BOLAND.—That is all.

Cross-examination.

Mr. McKEON.—Q. In answering that question, do you understand that No. 5 tank was absolutely air-tight, without ventilation?

A. I am familiar with No. 5 tank and its location in the ship, and its characteristics, and I testified the other day it did not have any ventilation.

Q. You then say that despite the fact that there was no ventilation in No. 5 tank, and that it was

(Testimony of Lebeus Curtis.)

air-tight, it is a good place for the stowage of cocoanut oil?

A. If the containers are good enough to carry it, it will carry it in No. 5 tank, in No. 7 tank, in No. 1 hold—if it is a good container it [241] will carry the oil; if it is not a good container it will leak wherever you put it; I do not think the fact that it was in No. 5 tank had anything to do with the leakage. As I understand it from Mr. Boland's question, the amount of leakage was the same in the two compartments, where they had different conditions.

Q. Then you do not think No. 5 tank is a good place for the stowage of cocoanut oil, but you assume that the containers in that compartment were not good?

A. No. I think No. 5 tank is all right to stow cocoanut oil in provided the containers are good.

Q. Despite the fact that it has not any ventilation or air?

A. It does not make any difference if the container is good.

Q. What do you mean by "good"?

A. Good enough to hold its contents.

Q. Do you mean a steel barrel?

A. Iron barrel, or wooden barrel, or any kind of barrel.

Q. Do you know of any wooden barrel that would stand the heat of No. 5 tank, loaded as the "Korea Maru" was loaded, as described to you on the trial?

(Testimony of Lebeus Curtis.)

A. As I understand, some of the barrels did come out of No. 5 tank in good condition, with all their contents.

Mr. BOLAND.—That is a fact.

Mr. McKEON.—Read the question, again.

(Last question repeated by the reporter.)

A. I understand it.

Q. Do you know of any?

A. I do not know of any wooden barrel that will hold cocoanut oil that I would guarantee would hold cocoanut oil on an under-deck vessel across the Pacific.

Q. Do you know any barrel that you would guarantee that would stand a trip across the Pacific stowed in No. 5 tank, with [242] no ventilation, and being air-tight?

A. Yes, I have seen barrels of cocoanut oil come out of other vessels where the temperature of the hold was very high—it came out in good condition, with all the contents, and I believe they would come across in the “Korea Maru” No. 5 tank.

Q. Will you read that question again?

(Last question repeated by the reporter.)

A. I think I have answered that the best I can, Mr. McKeon.

Q. Then you do not think that heat has any effect on cocoanut oil in a barrel?

A. I know it will liquefy cocoanut oil in barrels.

Q. Has it any effect on the barrels, that you know of? A. On empty barrels, or full barrels?

Q. On full barrels, and if so, what is the effect?

(Testimony of Lebeus Curtis.)

A. I think it will shrink a barrel—heat will shrink a barrel.

Q. Do you think it will? A. Yes.

Q. Do you think that there would be a heat in No. 5 tank, located immediately abaft the engine-room and completely enclosed, with no ventilation, and the only opening into it being covered over with hatch boards, and seven feet of cargo?

A. Some heat, yes.

Q. Considerably more than you would find in No. 7 hold? A. Yes.

Q. You don't know what the heat of that tank would be? A. No.

Q. Captain, as I understand you, if you have good wooden containers, you can properly stow cocoanut oil in the compartment on the ship which has no ventilation, is air-tight, and gets considerable heat from the engine-room?

A. I think if the containers, the wooden barrels, are thoroughly seasoned, and are in good condition, tight, when they go on board the vessel, you can just as properly stow them in No. 5 tank as any other part of the vessel. [243]

Q. Without any air? A. Without any air.

Q. Without any ventilation?

A. I am taking into consideration all of the conditions of No. 5 tank when I say that.

Mr. McKEON.—That is all.

Mr. BOLAND.—That is all. [244]

Wednesday, April 16, 1919.

Testimony of William F. Dunn, for Libelant.

WILLIAM F. DUNN, called for the libelant, sworn.

Mr. McKEON.—Q. What is your full name?

A. William F. Dunn.

Q. You were in charge, for a considerable period of time, of the stevedoring of the T. K. K. ships, were you not? A. Yes.

Q. In that capacity, do you remember a shipment of cocoanut oil that came in on the “Korea Maru”?

A. I do.

Q. Do you remember a shipment of cocoanut oil that came in on the “Korea Maru” in the latter part of 1917, consigned to Willits & Patterson?

A. I do.

Q. Do you remember where that oil was stowed on the “Korea Maru”?

A. Part of it in No. 5 tank, and part in No. 7 lower hold.

Q. In what containers was that oil?

A. Wooden barrels.

Q. Did you see the barrels of cocoanut oil in that shipment that were stowed in No. 5 tank?

A. I did.

Q. When did you see that with respect to the discharge—while they were discharging it?

A. While they were discharging it.

Q. What condition was that oil in No. 5 tank in?

A. In very poor condition, the barrels leaking.

(Testimony of William F. Dunn.)

Q. Will you describe the condition of the barrels as you observed them in No. 5 tank?

A. I remember distinctly that they were leaking very badly. As a matter of fact, my attention was called to the fact that they had got into the oil and I was asked by either the fireman or one of the head assorters to go down and look at the condition of the oil as it came out of the ship.

Q. What did you notice about the barrels?

A. Particularly, that they were open and were leaking—that the oil was leaking out of them.

Q. Did you or did you not notice whether or not any of the heads [245] were off the barrels?

A. I am inclined to think that there were heads off of the barrels, that is, some of the barrels, the latter end of the discharge of the oil—I am quite sure that many of the heads were off.

Q. Did you notice whether or not any of the barrels were broken or stove in?

A. Some of the heads were out of the barrels, yes.

Q. How long were you engaged in that business for the T. K. K. line?

A. I started on the dock as the contracting stevedore of the T. K. K. Company in 1901.

Q. You were continuously with them up till when?

A. 1917.

Q. During that period of time, did you ever see a consignment of cocoanut oil come into this port in worse condition than the barrels of oil that came out of No. 5 tank?

(Testimony of William F. Dunn.)

A. Not on any of the vessels that I ever had to discharge.

Q. The testimony you have given all relates to the oil that came out of No. 5 tank? A. Yes.

Q. Did you see the oil in the same shipment that was stowed in No. 7 hold?

A. I saw oil that was stowed in No. 7, but I don't know that it was the same shipment—I would not say positively that it was of the same shipment, but I know that there was oil stowed in No. 7.

Q. What was the condition of that oil in No. 7?

A. I don't remember having seen it being discharged, but I remember standing on the steerage deck by No. 7 when they were discharging freight that had been stowed on top of the oil, and as far as I could see, those barrels were not in bad condition.

Q. Were they in apparent good order and condition?

A. They were apparently in good condition; as I remember, they were only one high on top of the lower hold, that is, the deck.

Q. One tier?

A. One tier, and there were not a great many of them; possibly I was not there when they were being discharged; as [246] a matter of fact, I do not remember having seen them discharged.

Q. Did you have a conversation with the chief engineer of the ship at that time during the discharge? A. I did.

Q. Will you relate that conversation, where it was, and who was present, if anyone?

(Testimony of William F. Dunn.)

A. I was standing just aft of the chief engineer's room, near the rail, overlooking No. 5 hatch, and during the time that this oil was being discharged some mention was made, possibly by myself or possibly by the chief engineer, I don't remember which, about the condition of the oil.

Q. In No. 5 tank?

A. As it was coming out of No. 5 tank; we were discharging it in net slings, and as it was hoisted up and then swung over on to the dock, a great deal of the oil was leaking out of the barrels, and he said that he knew that the oil was leaking in No. 5 tank because when they pumped their bilges at sea there was an extra large amount of oil being discharged, and they could see it on the water.

Mr. McKEON.—That is all.

Cross-examination.

Mr. BOLAND.—Q. Your relation with the respondent at the time you testify to was as contracting stevedore, was it not, Mr. Dunn? A. Yes.

Q. You held a contract under which you were paid a certain amount for stevedoring the vessels?

A. Exactly.

Q. That contract is now terminated, is it not?

A. Yes.

Q. Have you any litigation pending against the respondent? A. I have.

Q. In which you seek damages? A. Yes.

Q. In about what sum? A. \$150,000.

Q. Who were your foremen on the "Korea Maru" at the time you testify to?

(Testimony of William F. Dunn.)

A. The head foreman was James Gibson, and the man in charge of the after end of the ship was James Powers. [247]

Q. Was Mr. Barry employed by you at the time?

A. Barry was an employee of mine at the time, and I think that possibly he was, although I would not say for sure, in charge of the assorting at the after end of the vessel. I knew that he was what we term our second man, our second assorter, and he would likely be in charge of the after end; that I am not sure of.

Q. You said that you looked down from the deck into No. 7 hatch, and saw the barrels, and they appeared to be in good condition? A. Yes.

Q. But you did not see them discharged?

A. No, I do not remember seeing them discharged.

Q. Did you go up alongside the barrels as they came out of No. 5 tank? A. Yes.

Q. Some of them had the heads stove in?

A. Yes.

Q. There were various conditions of fullness?

A. Yes.

Q. Some empty, were they? A. Some empty.

Q. Some half full? A. Some half full.

Q. And some full? A. Exactly.

Mr. BOLAND.—That is all.

**Testimony of Benjamin Free, for Respondent
(Recalled).**

BENJAMIN FREE, recalled for the respondent.

Mr. BOLAND.—Q. Mr. Free, without going into a detailed explanation, will you now refresh your recollection as to the wooden partition separating the tank No. 5 from the water-tanks, and tell us whether the planking there was set so close together as to permit the passage of air from the skin of the vessel to tank 5, or not?

A. It is what they call a temporary bulkhead, put up there for stowage of cargo, to keep it from falling off this recess or the shaft alley, and this bulkhead is about 1½ inch by 8 planking, nailed on to a carlin, and the same on top; these [248] boards are just placed edge to edge.

Q. There were interstices, were there, between the planks, so that there would be—

Mr. McKEON.—That is objected to as leading.

A. Yes, there was a door.

Mr. BOLAND.—I withdraw the question.

A. (Continuing.) These planks or boards were set edge to edge, and there was no caulking, or no tongue-and-groove.

Q. In other words, would it permit the passage of air from the skin of the ship to the cargo in tank 5?

A. Yes, because there was one board left out altogether there, to get a passageway in between the tanks, so that they could go to the skin of the ship.

(Testimony of Benjamin Free.)

There was a board on an incline there running to the fore and aft stringer on the side of the ship from the shaft alley recess in between the two tanks, just room enough for you to crawl down, in between. There was just one width of the board out.

Cross-examination.

Mr. McKEON.—Q. When did you examine that bulkhead?

A. That is two weeks ago, or three weeks ago—the day the “Korea” sailed, or the day before she sailed.

Q. The day before she sailed? A. Yes.

Q. How much cargo did she have in that compartment, if any?

A. She did not have any, hardly.

Q. She had some?

A. Very little, though.

Q. You don't know what condition that bulkhead was in at the latter part of 1917?

A. No, the original bulkhead, or part of it, I would not swear to.

Q. Then your position is this was neither caulk or tongue-and-groove? A. Yes.

Q. In other words, it was planks laid on top of each other?

A. Yes, edge to edge, a temporary bulkhead, as they call it. [249]

Q. Now, the plank that you say was missing out of that bulkhead, which side was it on, the star-board side or port side?

(Testimony of Benjamin Free.)

A. On the starboard side.

Q. On the starboard side? A. Yes.

Q. Isn't that in the nature of a doorway to get into the tanks?

A. No, they just left out this plank, large enough for an individual to go through.

Q. Where is it, in the center, or in the end?

A. In the center between the two tanks, there is a tank aft and a tank forward.

Q. But it is not a plank out, it is almost a doorway? A. It is one plank out there.

Q. How wide is it? A. About ten inches.

Q. Up and down?

A. No; it is over six feet high.

Q. It is that one vertical plank that is out?

A. Yes.

Q. How do the planks in that bulkhead run, fore-and-aft, or up and down?

A. Up and down, vertical.

Q. They do? A. Yes.

Q. You are certain of that? A. Yes.

Q. You are just as positive of that as any other thing you have testified to?

A. As positive as that I have my hat in my hand.

Q. The photographs would not show you the contrary?

A. Yes, they would, because we moved the plank to get in there.

Mr. McKEON.—May I touch upon a matter he testified to the other day?

Mr. BOLAND.—Yes.

(Testimony of Benjamin Free.)

Mr. McKEON.—Q. Have you ever sailed on a ship that carried cocoanut oil? A. No.

Q. Have you ever manufactured cocoanut oil? A. No.

Q. Do you know what cocoanut oil looks like? A. Yes.

Q. Has it the same color as every other oil you have seen? [250] A. No.

Q. Entirely different, is it not?

A. Yes, it is white.

Q. It is as distinguishable from fuel oil as night is from day, is it not? A. Yes.

Q. What does the "Korea Maru" burn?

A. Coal.

Q. You still maintain, do you, that the quality of seepage from the engine-room into No. 10 bilge would be considerable? A. Yes, it would.

Q. How much, half an inch, or two inches?

A. Well, according to how long they keep the pump going; the seepage and water service mix together; that saponifies in there and that all churns up white.

TESTIMONY CLOSED.

[Endorsed]: Filed Apr. 25, 1919. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [251]

In the Southern Division of the United States District Court, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,302.

CHARLES D. WILLITS and I. L. PATTERSON, Copartners Doing Business Under the Firm Name of WILLITS and PATTERSON,

Libelants,

vs.

The Japanese Steamship "KOREA MARU," Her Engines, Boilers, Boats, Tackle, Apparel and Furniture,

Respondent.

TOYO KISEN KAISHA,

Claimant.

Memorandum Decision,

Filed October 16, 1919.

(OPINION AND ORDER THAT DECREE BE ENTERED IN FAVOR OF LIBELANTS AND REFERRING CAUSE TO U. S. COMMISSIONER TO ASCERTAIN AMOUNT DUE.)

McCUTCHEN, OLNEY & WILLARD, for Libelants.

SAMUEL KNIGHT and F. E. BOLAND, for Respondent.

CUSHMAN, District Judge.

On, or about the 7th day of July, 1917, libelants,

at the Port of Manila, delivered to the respondent steamer, "Korea Maru," 542 barrels of cocoanut oil for transportation to the Port of San Francisco. Three bills of lading were issued for the total shipment; 440 barrels were stowed in a compartment known as No. 5 tank and the balance 102 barrels, were stowed in No. 7 hold. During the voyage, a great quantity of the oil leaked out of the barrels. This oil found its way into the bilges, through the scuppers, and was pumped overboard. Libelants in this action seek [252] to recover the value of the oil so pumped overboard, on the ground that No. 5 tank was an improper place for the carriage of cocoanut oil. There were 245,715 pounds of cocoanut oil and there was a large loss, it being stated as over 92,000 pounds.

The answer denies that there was any negligence and sets up two affirmative defenses: First, that the bills of lading except liability for leakage of contents; second, that the containers of the cocoanut oil were insufficient.

Under the above exception in the bills of lading, respondent is not liable, unless it was guilty of negligence in stowage, or negligent in failing to save the oil after it escaped from the containers. This exception places upon libelants the burden of showing negligence in the stowage resulting in loss. An exception in the bills of lading on account of leakage has no different effect in this respect than other similar exceptions.

It will be impossible to fully consider the question of negligent stowage without considering at

the same time the affirmative defense regarding the sufficiency of the containers, as the issue becomes whether the proximate cause of the loss of the oil was negligence of respondent in stowage, or defects in the barrels. On account of the conclusion reached, it is not necessary to determine whether the oil could have been saved by the ship from the bilges, nor to determine whether, in fact, the soundings of the bilges would disclose the fact that the cargo oil was running through the scuppers.

The questions in this case are mainly questions of fact. The bills of lading under which the oil was carried do not contain any exception or notation thereon as to any bad condition of the shipment or any defect as to the containers. The barrels were of new California fir, having been shipped out knocked down to Manila and there set up just prior to the voyage in question. An examination of the barrels after their arrival in San Francisco showed [253] that they had been covered with glue on the inside, which was still hard. This is shown to have been one of the recognized methods of treating wooden barrels to fit them for carrying such oil. (The *Claverburn*, 147 Fed. 850, at 852.) The glue closes the pores of the wood and keeps out the oil.

The voyage in question was the hottest of the year. It was the hottest season of the year. The temperature of tank No. 5 was not taken on the voyage. The evidence tends to show that it was probably from 115 to 120 degrees Fahrenheit. The temperature of hold No. 7 was probably around 75

degrees. Coconut oil solidifies at 65 degrees and liquefies at 75 degrees. It has an expansion of 2/100ths of one per cent in every degree rise in temperature.

Coconut oil is a nonviscous oil. It is obvious, and the testimony is ample to show, that this would increase its fluidity when subjected to heat and facilitate its escape from its containers. The evidence also shows, and it appears to have been long recognized, that coconut oil is of a peculiarly penetrating character (The Dunbritton, 73 Fed. 535), which characteristic, as stated, doubtless would be intensified when subjected to heat.

In a letter from the chief officer of the "Korea Maru" to the agents of its owners, dated October 4, 1917—the chief officer being responsible for the stowage on this voyage—he says:

"* * * I understand that much leakage was found after discharging the cargo at San Francisco was from the barrels which were stowed in No. 5 hold. * * *

"However, as you are aware, the coconut oil will congeal itself if it meets with low temperature, and no fear of leakage, but should it become a little heated, it is very leakable even if protected by strong barrels, and I have often had the same experience. * * *

"The voyage No. 4 of this vessel from Hong Kong to San Francisco as above mentioned was the hottest of the season and therefore it was only natural that the temperature in the steamer heated and I am sure this caused so

much leakage, since I have no accountable reason otherwise. * * *

“I consider the above leakage due to temperature naturally heated during the voyage in the hot season, and the nature of [254] the oil. The leaked oil ran down into the Bilge well and it was every day pumped out of the steamer with the other bilge water as steamer cannot stop the pumping out of bilge water even for half a day.”

The danger of leakage being caused by heat is well understood by shipping men, as the evidence shows. As stated, it is clearly apparent that heat would increase the fluidity of the oil and, as it did so, the chances of its escape from any container would be greater; but, aside from this, there appear to be reasons for the escape of such oil from wooden containers subjected to heat, not at once apparent. So long as the result—the increased danger of leakage—is a well known fact among shipping men, it is not important to determine the scientific explanation. One of respondent's witnesses, a chemist, testified:

“A. All barrels in a commercial condition, so to speak, that is, as they would be met with in commerce, have more or less water in the wood fibre, and water in contact with cellular material of all kinds tends to swell it; there is a *quasi*-chemical combination takes place there, so that the volume of the whole is much greater than the sum of the volumes of water and wood separately; that combination does not take

place in the case of oil, and consequently when the water of a wood is driven out by one cause or another and is replaced by oil, there will be shrinkage. In other words, the sum of the volume of the oil and the volume of wood would practically represent the volume of the two in combination.

“Q. And there is an apparent shrinkage?

A. Yes.

“Q. Does the oil, itself, tend to drive the water out? You spoke of driving the water out of the wood by one means or another. Does the oil, itself, tend to do that?

“A. Yes, there is a tendency, if the wood is not properly protected, for the oil to penetrate into the wood and for the water which may escape as a vapor at the surface to be driven out.”

This witness was, evidently, at some pains to refrain from stating—although led by counsel for respondent—that the oil, unassisted, would drive the water from the wooden containers to a dangerous extent. An explanation of the process, taken in connection with the effect of heat upon the oil—increasing its fluidity, and thereby intensifying its facility for penetration— [255] and heat also expanding it, would increase its pressure upon the inner walls of the containers and thus increase its power of penetration and thereby help it in driving the water out of the wood of the staves and heads of the barrels, resulting in this shrinkage. The outer walls of the barrels being exposed to the

heated atmosphere, if excessive, the tendency would also be to help in the evaporation of the water from the outer surfaces. Thus it might be said that excessive heat would not only help to draw the water out of the wood, but also, by reason of the oil's expansion, to, at the same time, drive it out,

While there is a dispute in the evidence, it appears with reasonable certainty that, owing to its steel deck and bulkhead, its connection, and situation with relation to the engine-room thrust recess and a hot-water tank, together with want of ventilation, closed hatches with cargo on the top of them and the considerable distance intervening between its walls and the skin of the ship, tank No. 5 was the hottest place on the ship used for the stowage of cargo. While the temperature maintained is not shown with exactness, it is clear that it was relatively the highest and, as stated, 115 to 120 degrees Fahrenheit.

The preponderance of the evidence shows that No. 5 tank was an improper place for the carriage of this oil. Although there is much evidence on this and related questions and the evidence is somewhat in conflict, I do not deem it necessary to further state it at length or to enter upon its analysis or endeavor to determine what portions of it may be reconciled, except in one particular:

Upon the argument of the cause, respondent passed by other issues and disputes and placed its defense squarely upon one proposition: that, one part of the shipment of oil having been made in tank No. 5, and one part in hold No. 7, and hold No.

7 being admittedly a proper place for its stowage, and the extent and character of the loss of oil from the containers in hold No. 7 being the same [256] as that from those in tank No. 5, that this, necessarily, established two things; the fitness of tank No. 5 as a place of stowage, and the unfitness of the containers, the barrels, as the cause of the loss.

Before determining the correctness of the conclusion reached, it will be necessary to determine the truth of the premises. The one assumed fact disputed is that oil was lost from hold No. 7 in the same manner and, relatively, to the same extent, as in tank No. 5.

While the Court would not, probably, be justified in holding the converse of the rule invoked by respondent to be entirely decisive of the case, and that, if it were shown that the heat and losses were both greater in tank No. 5 than hold No. 7, it, necessarily, followed that the excessive heat was the cause of the loss, yet, in view of much that is admitted, it would, if shown, have to be considered as a very important circumstance.

The evidence upon which respondent mainly relies to establish that the barrels of oil in hold No. 7 were, at the time of discharge, in equally as bad condition as those in tank No. 5 is that of certain longshoremen who helped, upon the dock at San Francisco, in sorting this and other cargo from the ship. They were not upon the ship; did not see any part of the cargo in question in the ship; they are still in the employ of the claimant; their attention is not shown to have been directed at the

time to the source from which the badly leaking barrels came—whether from tank No. 5 or hold No. 7, and their testimony is vague and general in character. There is little definite or exact about it.

The evidence shows that there is generally a certain amount of leakage from wooden containers of this character of oil. I conclude that these witnesses are mistaken in thinking, upon having their attention directed to the transaction long afterwards, [257] that they recall that which they are unable to remember, or they have exaggerated the normal leakage of the containers from hold No. 7. The decided weight of the evidence is contrary to their testimony.

As shown above, the chief officer stated that his understanding (gained at the time most likely from those upon the ship) was that the loss of the oil was in tank No. 5.

The stevedores called by the respondent were from the cargo sorters working on the dock; none was called who helped break up the cargo in tank No. 5 or hold No. 7, or who assisted in getting it out of either. No record kept by, or on the part of the ship as to the condition of the oil barrels upon their discharge was introduced; nor was an attempt made to negative the existence of such, or otherwise account for its absence, although it was admitted that such a record was usually kept of the condition of the cargo by the stevedoring firm in charge of the discharge of this cargo, which firm was regularly employed by the claimant, and its production was demanded by the libellant.

The captain of the respondent vessel testified that, upon arrival at San Francisco, the condition of the cargo in No. 7 hold was good and that the condition of the barrels in No 5 tank was bad. Mr. Dunn, the head stevedore of the claimant, with a suit pending against it, but evidently a fair and careful witness, testified that he was asked when "they get into the oil" to look into the condition of it as it came out of the ship and that he found the barrels from No. 5 tank were open and leaking badly, many of the heads being off. Regarding the oil in No. 7 hold, this witness said:

"Q. What was the condition of the oil in No. 7?

"A. I don't remember having seen it being discharged, but I remember standing on the steerage deck by No.7 when they were discharging freight that had been stowed on top of the oil, and as far as I could see, those barrels were not in bad condition. [258]

"Q. Were they in apparent good order and condition?

"A. They were apparently in good condition; as I remember, they were only one high on top of the lower hold, that is, the deck."

There being but a single tier of these barrels in No. 7 hold, should have enabled Mr. Dunn to observe fairly well their condition.

The chief engineer of the vessel told Mr. Dunn that he knew at sea that the oil was leaking in No. 5 tank. There was no showing made that any other cargo stowed in No. 7 was damaged by oil.

'There was no notation of defects in the barrels made on the bills of lading. The bills of lading acknowledged receipt of the cargo "in apparent good order and condition." This is *prima facie* evidence of the suitability of the containers, except as to latent defects. (The Aki Maru, 255 Fed. 721, at 723). No latent defect is shown, unless the susceptibility of wooden barrels to shrinkage through the operation of this oil, particularly when heated, may be called such, and that being an effect well understood among shipping men cannot properly be so considered.

The containers, the barrels, as stated, were new; are shown to have been of material customarily used for that purpose and the interiors were glued in the usual manner. They were tight and sound, having no leakage when stowed at Manila, although their contents was then in a liquid state. The containers in No. 5 tank are not shown to have been of any different material or construction than those stowed in No. 7 hold. The implication from the testimony is that they were substantially alike. The fact that, at the end of the voyage, a portion of the barrels in No. 5 tank were still full, a part, empty, and the remainder partly empty does not establish defects originally in the containers of the two latter classes.

Doubtless, the tier of barrels on the steel floor directly above the engine-room thrust recess and those stowed next the aft steel bulkhead of the engine-room and main escapes, as well as those stowed next the hot-water tank would be subjected

to greater heat than those in other parts of the tank and, consequently, shrink and warp to a greater extent than those barrels next the steel floor of the tank. That they were damaged to a greater extent than those in the upper tiers of the barrels is fairly indicated by the [259] testimony of the chief stevedore, Mr. Dunn, who said:

“I am inclined to think that there were heads off the barrels, that is, some of the barrels at the latter end of the discharge of the oil.”

At the time of giving the foregoing testimony, he was speaking in his testimony of tank No. 5 and, naturally, the “latter end of the discharge of the oil” would be the barrels in the lower tier, that is, those upon the floor of the tank.

It being recognized that extreme heat was liable to cause the shrinkage of the barrels and consequent leakage, special care in stowing, in the particular of not exposing them to excessive heat, was necessary. (*The Aki Maru*, 255 Fed., 721 at 723, *supra*.) This is true, even where its effect would be to cause leakage, exemption from liability for which was covered by the exception in the bill of lading. (*The San Guglielmo*, 241 Fed., 969, 977.)

The combined effect of the heat upon the oil and the barrels, or, more specifically, the combined effect of the heat and the heated oil upon the moisture in the fibers of the barrels is found to be the cause of the shrinkage and consequent loss of the contents. Negligence in the stowage, exposing these barrels to excessive heat, not only contributed

to, but was the proximate cause of the loss of the oil in tank No. 5. I find that the barrels were fit and sufficient containers.

The decree will be for libelants and the cause will be referred in the usual way to ascertain the amount recoverable.

[Endorsed]: Filed Oct. 16, 1919. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [260]

At a stated term of the District Court of the United States, for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, State of California, on Thursday, the sixteenth day of October, in the year of our Lord one thousand, nine hundred and nineteen. Present: The Honorable, WM. W. MORROW, Judge.

No. 16,302.

WILLITS and PATTERSON, etc.,

vs.

S. S. "KOREA MARU," etc.

(Order Referring Cause to Commissioner to Ascertain and Report Amount Due Libelants, etc.)

A memorandum decision of the merits having this day been received from the Honorable Edward E. Cushman, before whom this cause was heard and submitted, the Court ordered that said decision be filed and made a record herein, and that this cause

be and the same is hereby referred to a United States Commissioner to ascertain and report the amount due in accordance with said decision.
[261]

In the Southern Division of the United States District Court in and for the Northern District of California, First Division.

IN ADMIRALTY.—No. 16,302.

CHARLES D. WILLITS and I. L. PATTERSON, Copartners Doing Business Under the Firm Name of WILLITS and PATTERSON,
Libelants,

vs.

The Japanese Steamship "KOREA MARU," Her Engines, Boilers, Boats, Tackle, Apparel and Furniture,

Respondent.

TOYO KISEN KAISHA,

Claimant.

Interlocutory Decree.

The above-entitled cause having come on for hearing before the Honorable EDWARD E. CUSHMAN, United States District Judge, presiding at the trial of said cause, who after a trial and due consideration has rendered his decision herein, holding and deciding that libelants above named are entitled to recover judgment for the loss of their cargo and directing that a decree be entered

in their favor in accordance with said decision, and further directing that an order be entered referring said cause to a Commissioner of this Court to ascertain and assess the damages sustained by libelants,—

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED, in accordance with said decision, that Charles D. Willits and I. L. Patterson, copartners doing business under the firm name of Willits and Patterson, libelants herein, do have and recover judgment in the above-entitled cause for the damages sustained by them as in said decision awarded.

IT IS FURTHER ORDERED that said cause be referred to Francis Krull, Commissioner of this Court, to hear testimony and [262] ascertain and assess the said damage in accordance with said decision and thereafter make due report of same to this court.

Entered this 22d day of October, 1919.

WM. W. MORROW,
Judge.

[Endorsed]: Service of the within Interlocutory Decree and receipt of a copy is hereby admitted this 17th day of October, 1919.

SAMUEL KNIGHT,
F. ELDRED BOLAND,
Proctors for Claimant.

Filed Oct. 22, 1919. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [263]

In the District Court of the United States for the
Southern Division of the Northern District of
California, First Division.

No. 16,302.

CHARLES D. WILLITS and I. L. PATTER-
SON, Copartners, etc.,

Libelants,

vs.

The Japanese Steamship "KOREA MARU," etc.,
Respondent.

TOYO KISEN KAISHA,

Claimant.

(Report of U. S. Commissioner.)

To the Honorable, The District Court of the
United States for the Southern Division of the
Northern District of California, First Divi-
sion, and the Judges thereof:

Pursuant to a decretal order made on October
22, 1919, referring the above-entitled case to me to
ascertain and report the amount of the damage in
accordance with a decision of the Court therein, I
have to report that I was attended by the proctors
for the respective parties and the testimony here-
unto attached and made a part hereof was taken as
therein stated.

It is contended by respondent that libelants must
show that the actual loss herein was from hold or
tank No. 5, as distinguished from a combined loss
from hold No. 5 and hold No. 7. The Court ap-

pears to have found in its opinion, and the decision of the case is based upon the fact, that the loss for which damage is claimed was from hold No. 5, and that the loss from hold No. 7, was only the normal leakage.

From the evidence adduced before me I do find and report as follows:

1. That 245,717 pounds of cocoanut oil was delivered for shipment by libelants at the port of loading.
2. That only 143,664 pounds of said oil was delivered in San Francisco, California, the port of discharge.
3. That the shortage was the difference between finding No. 1 and finding No. 2, or 102,053 pounds of cocoanut oil.
4. That what is termed normal leakage is one per cent of the volume of oil in barrels. [264]
5. That the normal leakage on this entire cargo was 2,457 pounds.
6. That the normal delivery should have been the difference between finding No. 1 and finding No. 5, or 243,260 pounds of cocoanut oil.
7. That the loss occasioned for which damage is found, is the difference between finding No. 6 and finding No. 2, or 99,596 pounds of cocoanut oil.
8. That the market value of cocoanut oil at the port of discharge at the date of delivery of the cocoanut oil, was \$13.25 per hundred pounds or $13\frac{1}{4}\text{¢}$ per pound.

9. That the damage was 99,596 pounds of coconut oil at $13\frac{1}{4}\text{¢}$ per pound or \$13,196.47.
10. That respondent turned over to libelants the sum of \$1,140.73, the amount realized from sweepings of cocoanut oil from the vessel carrying same.

I do therefore find and report that there is due libelants herein for the damage occasioned for which respondent has been held liable the sum of \$12,055.74, together with interest at the rate of seven per cent per annum from August 10, 1917, the date when delivery should have been made of the cargo of cocoanut oil.

All of which is respectfully submitted.

FRANCIS KRULL, (Seal)

United States Commissioner for the Northern District of California, at San Francisco.

Dated, September 2, 1920. [265]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

IN ADMIRALTY.—No. 16,302.

Before FRANCIS KRULL, Esq., United States Commissioner, on Reference to Ascertain and Report Amount of Damage.

July 29th, 1920.

CHARLES D. WILLITS and I. L. PATTERSON, Copartners, etc.,

Libelants,

vs.

The Japanese Steamship "KOREA MARU," etc.,
Respondent.

TOYO KISEN KAISHA,

Claimant.

(Testimony Taken on Reference to U. S. Commissioner to Ascertain Amount Due.)

APPEARANCES:

JOSEPH B. McKEON, Esq., for Libelants.

F. E. BOLAND, Esq., for Claimant.

Mr. McKEON.—This case is referred for proof of damages and is a case tried by Judge Cushman and a written opinion is on file.

The COMMISSIONER.—I have read the opinion.

(Testimony of W. E. Boyer.)

Mr. McKEON.—The libel alleges the shipment of 245,717 pounds of cocoanut oil. There was a shortage of cocoanut oil found upon the ship's arrival in San Francisco when the cocoanut oil was weighed by the public weighers of the State of California. Their certificates of weights were introduced on the trial of case and are marked Libelant's Exhibit 9, 10, and 11. These three certificates show that there was 143,664 pounds discharged by the ship in San Francisco. Deducting 143,664 pounds from the total amount delivered to the ship leaves a shortage of 102,053 pounds. There is no dispute on those figures.

Mr. BOLAND.—No. [266]

Mr. McKEON.—These three exhibits having been introduced in the case before the Court, I assume they are a part of the record now and we can just refer to them as if they were before your Honor in this hearing. So that we have on the face of the record a shortage of 102,053 pounds.

Testimony of W. E. Boyer, for Libelant.

W. E. BOYER, called for the libelant, sworn.

Mr. McKEON.—Q. Mr. Boyer, what is your business?

A. Salesman for Willits and Patterson.

Q. Were you a salesman for Willits and Patterson in August and September of 1917?

A. I was.

Q. Were you in charge of the oil department of that Company. A. I was.

Q. Were you at that time, in charge of that de-

(Testimony of W. E. Boyer.)

partment, familiar with the market value of cocoanut oil in San Francisco? A. I was.

Q. What was the market value of the cocoanut oil of the kind that arrived on the "Korea Maru" in August and September, 1917?

Mr. BOLAND.—I object to the value in San Francisco as immaterial and irrelevant.

The WITNESS.—Thirteen and a quarter.

Mr. McKEON.—Q. Thirteen and a quarter per hundred pounds?

A. Yes.

Cross-examination.

Mr. BOLAND.—Q. Does that value which you have just given include freight?

A. Yes, sir, that is the market value here.

Q. Including freight, insurance and everything from the Orient? A. Yes, sir.

Q. That was on the dock or after moved into tanks?

A. That was on the dock, that is in barrels.

Q. In barrels on the dock?

A. It came in barrels.

Q. But transported to the warehouse?

A. Just on the dock. [267]

Q. Do you know what the value of the oil would be at the same time in the Orient at the point where shipment was made?

Mr. McKEON.—That is objected to as incompetent, irrelevant and immaterial and not within the issues of the case.

(Testimony of W. E. Boyer.)

The COMMISSIONER.—He is just testing his knowledge of the oil market.

The WITNESS.—A. Well, it would be a price less the freight.

Mr. BOLAND.—Q. Doesn't the oil acquire additional value besides the stated value here less freight, by reason of shipment from the Orient here?

A. You mean that it advances on it's way here?

Q. Yes. Isn't that the fact that oil here ready for delivery is worth more than the same oil would be worth in the Orient at point of shipment less freight?

A. No, I don't think so.

Q. Wouldn't the mere fact that you had space on the vessel give the oil additional value.

A. You mean here?

Q. Yes. A. No, I don't think so.

Q. At this time there was a shortage of shipping space on trans-Pacific vessels from the Orient to San Francisco?

A. I don't remember, I don't think there was. That was barrels, I don't think there was a shortage.

Mr. BOLAND.—That is all.

Mr. McKEON.—That is all.

Mr. BOLAND.—By arrangement we will offer in evidence the testimony of the witnesses taken on the original hearing subject to Mr McKeon's objection as to its materiality. We offer the testimony by witnesses for the libelants of John H. Rinder, F. C. Gaster and James G. Rudden, and the wit-

(Testimony of W. E. Boyer.)

nesses for the claimant George E. Chapin, James McCarthy, James Gibson and Wm. J. Barry, also Cecil Brown for the libelant. (Remark addressed to Mr. McKeon.) [268] And the amount of the oil, I think you told me, was 440 barels in No. 5.

Mr. McKEON.—There were 102 in No. 7, and the barrels were in No. 5.

Mr. BOLAND.—And 440 I think in 5.

Mr. McKEON.—Q. Mr. Boyer the bill that you rendered to the T. K. & K. line for shortage was based on 12.25 per hundred pounds, can you account for the difference between that statement and the market value of the oil in San Francisco?

A. That is the selling or invoice price. The market value is \$13.25.

Q. The market value here? A. Yes.

Q. That was the selling or invoice price?

A. Yes.

Q. This 12.25 is what?

A. It is C. I. F. here. This was a bill from the shippers C. I. F. here.

Q. At 12.25?

A. Yes. The market value is \$13.25.

Q. The market value is \$1.00 a hundred pounds more than the invoice price? A. Yes, sir.

Q. In other words, that would be your profit on the transaction? A. Yes.

Mr. BOLAND.—That is what I wanted.

Mr. McKEON.—There was a credit of \$1,140.73 from the sweepings of oil turned over months after which they said was our oil, and we gave them a

credit of \$1,140.73, so that should be deducted from whatever finding you may make.

The COMMISSIONER.—That was salvage.

Mr. McKEON.—Yes, as to the oil.

Mr. McKEON.—Now, with reference to the offer of the testimony of those witnesses which is already in the case. All witnesses testified in court and their testimony was considered by Judge Cushman. In his opinion Judge Cushman made a finding of [269] fact upon that conflicting testimony. As I gather from Mr. Boland's offer it is to show that there was a leakage of oil in No. 7.

Mr. BOLAND.—Yes. This oil was in hold 5 and 7 and it was contended by libelants that the stowage in hold 5 was negligent stowage by reason of the proximity to the engine-room. We contend, and the evidence shows nothing to the contrary, that hold 7 was in good stowage condition and not negligent stowage; that if we are liable under this decision or interlocutory decree we are liable only for loss by reason of negligent stowage in hold 5 and that the libelant must, in order to establish a claim for damages, show what the actual loss was from hold 5 as distinguished from the combined loss from hold 5 and 7.

Mr. McKEON.—I am not finished. In answer to that we said the Court has found as a fact that the leakage shown on the weighers' certificates was from No. 5 because the Court holds against the claimant on the testimony introduced to show leakage in No. 7 and finds expressly that claimant's

witnesses are mistaken in saying there was leakage in No. 7. On page 7 of the opinion the Court expressly holds "they have exaggerated the normal leakage of the containers from hold No. 7. The decided weight of the evidence is contrary to their testimony." So that under the Court's ruling you cannot say there was nothing but the normal leakage in No. 7. It could not be more express on that point.

The COMMISSIONER.—Is there such a standard as normal leakage?

Mr. McKEON.—The testimony of the ship shows on that point that there was a normal leakage of one-half of one per cent to one per cent.

The COMMISSIONER.—Has that been deducted?

Mr. McKEON.—No. The Court corrects that in the testimony, that we have 102 barrels in No. 7. [270]

Mr. McKEON.—Q. Mr. Boyer, what was the average weight of pounds in a barrel of this cocoa-nut oil? A. 375 pounds net.

Mr. McKEON.—There were 102 barrels in No. 7 and the testimony shows an average weight of 375 pounds net each, giving us 38,250 pounds of oil in No. 7. Now deduct the normal leakage from 38,250 pounds of one-half of one per cent to one per cent, taking, for instance, the highest normal leakage of one per cent away as I figure it you have to deduct \$59.00, approximately 30, from the normal leakage which the Court said occurred in No. 7. Under the

Court's findings of fact and the whole opinion we think that the question of leakage in No. 7 is a closed issue in the case, the ship has had its day in court, particularly inasmuch as the Court has found against them. I think that is all. Oh, yes; I want to show the date the ship came in.

Mr. BOLAND.—Yes. The ship came in on August 1st, 1917.

Mr. McKEON.—It would be a little later than August 1st, take August 10th, we will stipulate that will be the day.

Mr. McKEON.—I ask in addition an allowance of interest at the rate of 7 per cent per annum from August 10th, 1917, that being the stipulated date of the arrival of the vessel.

Mr. BOLAND.—Do you desire any further enlightenment on the subject as to the testimony I refer to?

The COMMISSIONER.—It is a question of fact, I think I get your point in a way, but if you desire to submit a little statement referring to it, I will be glad to have it.

Mr. McKEON.—You are going on your vacation, Mr. Boland, and it should be put in before you go. I can put mine in right away.

Mr. BOLAND.—I will put mine in before I go away.

The COMMISSIONER.—The matter stands submitted with the understanding that you will file statements before Tuesday, Mr. Boland, [271] and Mr. McKeon will reply to that and that will close the matter.

Mr. BOLAND.—All right.

Mr. McKEON.—I can put mine about the same day.

[Endorsed]: Filed Sep. 3, 1920. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [272]

In the Southern Division of the United States District Court, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,302.

CHARLES D. WILLITS and I. L. PATTERSON,
Copartners, etc.,

Libelants,

vs.

The Japanese Steamship "KOREA MARU," etc.,
Respondent.

TOYO KISEN KAISHA,

Claimant.

Claimant's Exceptions (to Commissioner's Report).

Claimant hereby excepts to the report of the Commissioner herein, dated 2d September, 1920, on the following grounds, to wit:

1. Because the Commissioner found that there was no more than normal leakage from the cocoanut oil in hold 7.

2. Because the Commissioner found that the Court, in its Interlocutory Decree, had already determined that there was no more than normal leakage from the cocoanut oil in hold 7.

3. Because the Commissioner found that the normal leakage on the entire cargo was 2,457 pounds.

4. Because the Commissioner found that the loss occasioned, for which damage is found, is 99,596 pounds of cocoanut oil.

5. Because the Commissioner found that the damage to libelants was at the rate of \$13.25 per hundred pounds, or 13 $\frac{1}{4}$ ¢ per pound. [273]

6. Because the Commissioner found that libelants should recover interest at the rate of 7% per annum from 10th August, 1917.

SAMUEL KNIGHT and
F. ELDRED BOLAND,

Proctors for Claimant.

Receipt of a copy of the within claimant's exceptions is hereby admitted this 10th day of Sept., 1920.

McCUTCHEON, WILLARD, MANNON &
GREENE,

K.,

Proctors for Libelants.

[Endorsed]: Filed Sep. 11, 1920. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [274]

In the Southern Division of the United States
District Court for the Northern District of
California, First Division.

IN ADMIRALTY—No. 16,302.

CHARLES D. WILLITS and I. L. PATTERSON,
Copartners, etc.,

Libelants,

vs.

The Japanese Steamship "KOREA MARU," etc.,
Respondent.

TOYO KISEN KAISHA,

Claimant.

**(Order Overruling Exceptions to Commissioner's
Report, etc.)**

McCUTCHEN, WILLARD, MANNON & GREENE,
Proctors for Libelants.

SAMUEL KNIGHT, Esq., and F. E. BOLAND,
Esq., Proctors for Respondents.

Claimant's exceptions to the report of the Commissioner herein are overruled, and a decree will be entered for libelants for the sum of \$12,055.74, with interest thereon at 7 per cent per annum from August 10th, 1917.

Let such decree be presented.

October 20th, 1920.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Oct. 20, 1920. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [275]

In the Southern Division of the United States
District Court for the Northern District of
California, First Division.

IN ADMIRALTY—No. 16,302.

CHARLES D. WILLITS and I. L. PATTERSON,
Copartners Doing Business Under the Firm
Name of WILLITS and PATTERSON,
Libelants,

vs.

The Japanese Steamship "KOREA MARU," Her
Engines, Boilers, Boats, Tackle, Apparel and
Furniture,

Respondent.

TOYO KISEN KAISHA,

Claimant.

Final Decree.

The above-entitled cause having come on regularly for trial, libelant appearing by Messrs. McCutchen, Willard, Mannon & Greene and Joseph B. McKeon, their proctors, and claimant and respondent appearing by Samuel Knight and F. E. Boland, its proctors, and it appearing that the Honorable Edward F. Cushman, the judge before whom the above-entitled action was tried, has filed his opinion herein, holding and deciding among other things that claimant and respondent is liable to libelants for the damages sustained by them because of the matters and things set forth in the libel and amendment thereto on file herein.

And it further appearing that an interlocutory decree was duly and regularly made and entered herein referring said cause to Francis Krull, United States Commissioner herein, to ascertain and report the amount of damages suffered by said libelants; and it appearing that said Francis Krull, commissioner, has ascertained [276] and reported the said damage as amounting to the sum of twelve thousand and fifty-five and 74/100 (12,055.74) dollars, together with interest thereon at the rate of seven (7) per cent per annum from the 10th day of August, 1917, until paid; and it further appearing that exceptions to said report have been filed by said claimant and respondent, and said exceptions to said report having been heard and overruled, and the said report being hereby confirmed in all respects.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Charles D. Willits and I. L. Patterson, copartners doing business under the firm name of Willits and Patterson, libelants herein, do have and recover from the Japanese Steamship "Korea Maru," her engines, boilers, boats, tackle, apparel and furniture, and claimant herein, Toyo Kisen Kaisha, the sum of twelve thousand and fifty-five and 74/100 (12,055.74) dollars, together with interest thereon at the rate of seven per cent per annum from the 10th day of August, 1917, to the 26th day of October, 1920, amounting to the sum of two thousand, six hundred ninety-three and 45/100 (2,693.45) dollars, or a total sum of fourteen thousand, seven hundred

and forty-nine and 19/100 (14,749.19) dollars, together with interest on said total sum of fourteen thousand, seven hundred and forty-nine and 19/100 (14,749.19) dollars at the rate of seven per cent per annum from the said 26th day of October, 1920, until paid; together with their costs to be hereafter taxed, with interest on said costs so taxed.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that unless an appeal be taken from this decree within the time limited by the rules and practice of this court the stipulators for costs and value on the part of the claimant of said Japanese steamship "Korea Maru" shall cause the engagements of their stipulations to be performed, or show cause within four days after the expiration of the aforesaid [277] time within which to appeal, why execution should not issue against their goods, chattels and lands for the amounts set forth in this decree.

Done in open court this 27th day of October, 1920.

M. T. DOOLING,
District Judge.

[Endorsed]: Service of the within final decree and receipt of a copy is hereby admitted this 21st day of October, 1920.

SAMUEL KNIGHT and
F. ELDRED BOLAND,
By J. E. MANDERS,
Proctors for Claimant.

Filed Oct. 27, 1920. W. B. Maling, Clerk. By
C. W. Calbreath, Deputy Clerk. [278]

In the Southern Division of the United States
District Court for the Northern District of
California, First Division.

IN ADMIRALTY—No. 16,302.

CHARLES D. WILLITS and I. L. PATTERSON,
Copartners Doing Business Under the Firm
Name of WILLITS and PATTERSON,
Libelants,

vs.

The Japanese Steamship "KOREA MARU," Her
Engines, Boilers, Boats, Tackle, Apparel and
Furniture,

Respondent.

TOYO KISEN KAISHA,

Claimant.

Notice of Appeal.

To Libelants Above Named and to Messrs. McCutchen, Willard, Mannon & Greene, Their Proctors, and to the Clerk of the Southern Division of the United States District Court, for the Northern District of California:

You, and each of you, will please take notice that the respondent herein, the Japanese steamship "Korea Maru," her claimant, Toyo Kisen Kaisha, and United States Fidelity & Guaranty Company, her stipulator, appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, from the final decree of the Southern Division of the United States District Court, for the Northern District of

California, made and entered in said cause on the 27th day of October, 1920.

Dated San Francisco, California, November 29th, 1920.

SAMUEL KNIGHT and

F. ELDRED BOLAND,

Proctors for Respondent, Claimant and United States Fidelity & Guaranty Company.

[Endorsed]: Due service and receipt of a copy of the within Notice of Appeal is hereby admitted this 29th day of November, 1920.

McCUTCHEN, WILLARD, MANNON &
GREENE,

Proctors for Libelants. [279]

Filed Nov. 29, 1920. W. B. Maling, Clerk. By
C. W. Calbreath, Deputy Clerk. [280]

In the Southern Division of the United States
District Court for the Northern District of
California, First Division.

IN ADMIRALTY—No. 16,302.

CHARLES D. WILLITS and I. L. PATTERSON,
Copartners Doing Business Under the Firm
Name of WILLITS and PATTERSON,
Libelants,

vs.

The Japanese Steamship "KOREA MARU," Her
Engines, Boilers, Boats, Tackle, Apparel and
Furniture,

Respondent.

TOYO KISEN KAISHA,

Claimant.

Assignment of Errors.

I.

The District Court erred in finding and holding that respondent and claimant are liable to libelant in the sum of \$12,055.74, or any sum.

II.

The District Court erred in finding and holding that respondent and claimant are liable to libelant in the sum of \$2,693.45 interest.

III.

The District Court erred in finding and holding that respondent and claimant are liable to libelant for interest upon the sum of \$14,749.19 from 26th October, 1920, at the rate of 7%.

IV.

The District Court erred in finding and holding that stowage of cocoanut oil in hold five of respondent vessel was negligent.

V.

The District Court erred in finding and holding that the containers of said cocoanut oil were not insufficient. [281]

VI.

The District Court erred in finding and holding that there was not an equivalent leakage of cocoanut oil stowed in hold seven.

VII.

The District Court erred in finding and holding that libelant had established any measure of damage whatever, in that libelant did not establish the respective leakage from holds five and seven.

VIII.

The District Court erred in finding and holding that the leakage of cocoanut oil was caused by heat, and not by the insufficiency of the containers of said oil.

IX.

The District Court erred in finding and holding that respondent and claimant are liable to libelant, notwithstanding the exception contained in the bills of lading excepting liability for leakage of contents.

X.

The District Court erred in finding and holding that the fact that at the end of the voyage a portion of the barrels in hold number 5 were still full, a part empty and the remainder partly empty does not establish defects in the containers of the latter two classes.

XI.

The District Court erred in permitting the libel to be amended.

XII.

The District Court erred in overruling the claimant's and respondent's exceptions to the commissioner's report, fixing the amount of libelant's damages.

SAMUEL KNIGHT and
F. ELDRED BOLAND,

Proctors for Claimant and Respondent. [282]

[Endorsed]: Due service and receipt of a copy of the within assignment of errors is hereby ad-

mitted this 29th day of Nov., 1920.

McCUTCHEN, WILLARD, MANNON &
GREENE,

Proctors for Libelant.

Filed Nov. 29, 1920. W. B. Maling, Clerk. By
C. W. Calbreath, Deputy Clerk. [283]

In the Southern Division of the United States Dis-
trict Court, for the Northern District of Cali-
fornia, First Division.

IN ADMIRALTY—No. 16,302.

CHARLES D. WILLITS and I. L. PATTERSON,
Copartners, Doing Business Under the Firm
Name of WILLITS and PATTERSON,
Libelants,

vs.

The Japanese Steamship "KOREA MARU," Her
Engines, Boilers, Boats, Tackle, Apparel and
Furniture,

Respondent.

TOYO KISEN KAISHA,

Claimant.

Bond Staying Execution on Appeal.

KNOW ALL MEN BY THESE PRESENTS,
that American Indemnity Company, a corporation,
duly organized and existing under and by virtue of
the laws of the State of Texas, and licensed to do a
general surety business in the State of California,
as surety, is held and firmly bound unto the li-

belants in the above-entitled cause in the sum of Twenty Thousand Dollars (\$20,000), to be paid to the said obligees, to which payment well and truly to be made we do hereby bind ourselves firmly by these presents.

Signed, sealed and dated at San Francisco, California, this 29th day of November, 1920.

WHEREAS, Toyo Kisen Kaisha, claimant of the Japanese steamship "Korea Maru," the Japanese steamship "Korea Maru," respondent, and United States Fidelity & Guaranty Company, a corporation, her stipulator, have appealed to the United States Circuit Court of [284] Appeals, for the Ninth Circuit, from a Decree of the United States District Court, for the Southern Division of the Northern District of California, bearing date the 27th day of October, 1920, in a suit in which Charles D. Willits and I. L. Patterson, copartners, doing business under the firm name of Willits and Patterson, are libelants, and the Japanese steamship "Korea Maru," her engines, boilers, boats, tackle, apparel and furniture, is respondent, and Toyo Kisen Kaisha, is claimant, which Decree orders the said Japanese steamship "Korea Maru," respondent, Toyo Kisen Kaisha, her claimant, and United States Fidelity & Guaranty Company, her stipulator, to pay Charles D. Willits and I. L. Patterson, copartners, doing business under the firm name of Willits and Patterson, said libelants, the sum of Twelve Thousand Fifty-five and 74/100 Dollars (\$12,055.74), together with interest thereon at the rate of seven (7) per cent per annum from the 10th day of

August, 1917, to the 26th day of October, 1920, amounting to the sum of Two Thousand Six Hundred Ninety-three and 45/100 Dollars (\$2,693.45), or a total sum of Fourteen Thousand Seven Hundred and Forty-nine and 19/100 Dollars (\$14,749.19), at the rate of seven (7) per cent per annum from said 26th day of October, 1920, until paid, together with their costs and interest on said costs; and,

WHEREAS, the Japanese steamship "Korea Maru," Toyo Kisen Kaisha, her claimant, and United States Fidelity & Guaranty Company, her stipulator, desire, during the process of such appeal, to stay the execution of the said Decree of the District Court:

NOW, THEREFORE, the condition of this obligation is such that whereas, if the above-named appellants, the Japanese steamship "Korea Maru," Toyo Kisen Kaisha, her claimant, and United States Fidelity & Guaranty Company, her stipulator, shall prosecute said appeal with effect and pay all costs which may be awarded against them, as such appellants, if the appeal is not sustained, and shall [285] abide by and perform whatever decree may be entered by the United States Circuit Court of Appeals, for the Ninth Circuit, in this cause had and the mandate of said Court by the Court below, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

AMERICAN INDEMNITY COMPANY.

By THEODORE P. STRONG, (Seal)

Attorney in Fact.

Approved: November 29th, 1920.

M. T. DOOLING,
United States District Judge.

[Endorsed]: Due service and receipt of a copy of the within bond is hereby admitted this 29th day of Novr., 1920.

McCUTCHEN, WILLARD, MANNON &
GREENE,

Proctor for Libelant.

Filed Nov. 29, 1920. W. B. Maling, Clerk. By
C. W. Calbreath, Deputy Clerk. [286]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,302.

CHARLES D. WILLITS and I. L. PATTERSON,
Copartners, Doing Business Under the Firm
Name of WILLITS and PATTERSON,
Libelants,

vs.

The Japanese Steamship "KOREA MARU," Her
Engines, Boilers, Boats, Tackle, Apparel and
Furniture,

Respondent.

TOYO KISEN KAISHA,

Claimant.

Bond for Costs on Appeal.

KNOW ALL MEN BY THESE PRESENTS:
That American Indemnity Company, a corporation, duly organized and existing under and by virtue of the laws of the State of Texas, and licensed to do a general surety business in the State of California, as surety, is held and firmly bound unto the libelants in the above-entitled cause in the sum of Two Hundred and Fifty Dollars (\$250), to be paid to the said obligees, to which payment well and truly to be made it hereby binds itself firmly by these presents.

Signed, sealed and dated at San Francisco, California, this 29th day of November, 1920.

The condition of this obligation is such that, whereas, lately in the Southern Division of the United States District Court, for the Northern District of California, First Division, in Admiralty, [287] in the above-entitled cause, a decree was entered against the above-named respondent, claimant and United States Fidelity & Guaranty Company, stipulator, from which decree said respondent, claimant and stipulator have appealed to the United States Circuit Court of Appeals, for the Ninth Circuit:

NOW, THEREFORE, if said claimant, respondent and her stipulator, as appellants, shall prosecute their appeal to effect, and shall pay all costs on appeal, if said appeal is not sustained, then this obligation shall be void, otherwise to be and remain in full force and effect and execution to issue thereon for the amount of such costs, not exceeding Two

Hundred and Fifty Dollars (\$250), at the instance of any persons interested as aforesaid.

AMERICAN INDEMNITY COMPANY.

By THEODORE P. STRONG, (Seal)

Attorney in Fact.

[Endorsed]: Due service and receipt of a copy of the within Bond for Costs is hereby admitted this 29th day of Novr., 1920.

McCUTCHEN, WILLARD, MANNON &
GREENE,

Proctors for Libelant.

Filed Nov. 29, 1920. W. B. Maling, Clerk. By
C. W. Calbreath, Deputy Clerk. [288]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,302.

CHARLES D. WILLITS and I. L. PATTERSON,
Copartners, Doing Business Under the Firm
Name of WILLITS and PATTERSON,
Libelants,

vs.

The Japanese Steamship "KOREA MARU," Her
Engines, Boilers, Boats, Tackle, Apparel and
Furniture,

Respondent.

TOYO KISEN KAISHA,

Claimant.

**Notice of Filing Bond for Costs on Appeal and Also
Bond Staying Execution on Appeal.**

To Libelants Above Named and to Messrs. McCutchen, Willard, Mannon & Greene, Their Proctors:

You and each of you will please take notice that claimant and respondent above named did on the 29th day of November, 1920, file in the clerk's office of the above-entitled court their bond for costs on appeal and also their bond staying execution on appeal with the American Indemnity Company, a corporation, as surety.

November 29, 1920.

Yours, etc.,

SAMUEL KNIGHT and

F. ELDRED BOLAND,

Proctors for Claimant and Respondent.

[Endorsed]: Due service and receipt of a copy of the within notice, etc., is hereby admitted this 29th day of Novr., 1920.

McCUTCHEN, WILLARD, MANNON &
GREENE,

Proctors for Libelants. [289]

Filed Nov. 29, 1920. W. B. Maling, Clerk. By
C. W. Calbreath, Deputy Clerk. [290]

In the Southern Division of the United States District Court, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,302.

CHARLES D. WILLITS and I. L. PATTERSON,
Copartners, etc.,

Libelants,

vs.

The Japanese Steamship "KOREA MARU," etc.,
Respondent.

TOYO KISEN KAISHA,

Claimant.

Stipulation (and Order Transmitting Original Exhibits With Apostles on Appeal).

IT IS HEREBY STIPULATED, by and between the proctors for the respective parties hereto, that the original exhibits heretofore introduced in the above-entitled case may be transmitted to the Circuit Court of Appeals as original exhibits.

Dated December 17, 1920.

McCUTCHEN, WILLARD, MANNON &
GREENE,

Proctors for Libelants.

SAMUEL KNIGHT and

F. ELDRED BOLAND,

Proctors for Claimant.

It is so ordered.

M. T. DOOLING,

United States District Judge.

[Endorsed]: Filed Dec. 18, 1920. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [291]

**Certificate of Clerk U. S. Dittrich Court to Apostles
on Appeal.**

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 291 pages, numbered from 1 to 291, inclusive, contain a full, true and correct transcript of certain records and proceedings, in the case of Charles D. Willits and I. L. Patterson, Copartners, Doing Business Under the Firm Name of Willits & Patterson, Libelants, vs. The Japanese Steamship "Korea Maru," Her Engines, Boilers, etc., Respondent, No. 16,302, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the praecipe for apostles on appeal (copy of which is embodied herein) and the instructions of the proctors for appellants herein.

I further certify that the cost for preparing and certifying the foregoing apostles on appeal is the sum of One Hundred Four Dollars and Five Cents (\$104.05), and that the same has been paid to me by the proctors for libelants herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 20th day of December, A. D. 1920.

[Seal]

WALTER B. MALING,
Clerk.

By C. M. Taylor,
Deputy Clerk. [292]

[Endorsed]: No. 3610. United States Circuit Court of Appeals for the Ninth Circuit. Toyo Kisen Kaisha, a Corporation, as Claimant of the Japanese Steamship "Korea Maru," Her Engines, Boilers, Boats, Tackle, Apparel and Furniture, and United States Fidelity & Guaranty Company, Her Stipulator, Appellants, vs. Charles D. Willits and I. L. Patterson, Copartners Doing Business Under the Firm Name of Willits and Patterson, Appellees. Apostles on Appeal. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Filed December 20, 1920.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 3610

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

TOYO KISEN KAISHA et al.,

Appellants,

VS.

CHARLES D. WILLITS and I. L. PATTERSON et al.,

Appellees.

BRIEF FOR APPELLANTS.

KNIGHT, BOLAND, HUTCHINSON & CHRISTIN,
F. ELDRED BOLAND,

Proctors for Appellants.

No. 3610

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

TOYO KISEN KAISHA et al.,

Appellants,

VS.

CHARLES D. WILLITS and I. L. PATTERSON et al.,

Appellees.

BRIEF FOR APPELLANTS.

In this action libellant sues to recover from respondent damages due to the leakage of cocoanut oil on a voyage from Manila to San Francisco. It was alleged in the libel that the respondent steamship received on board at Manila, in all, 520 barrels of cocoanut oil for transportation to San Francisco; that cocoanut oil is an article requiring stowage in a cool place, and that instead of being so stowed on respondent vessel, it was improperly stowed in a hold (sometimes referred to as tank 5) "immediately adjoining the engine room", and "that by reason of said improper stowage and said negligent care of said cargo, said oil was caused by said heat to liquefy and to escape from the barrels in which the same was contained." (Apostles pp. 7-10.)

It is also alleged that after so escaping the respondent steamship failed to save the same. (Apostles pp. 7-10.)

The bills of lading acknowledge receipt in good order and condition, but contain an exception as follows: "*leakage of contents at owner's risk*". (Apostles p. 22.)

It promptly developed at the trial that the coconut oil was already in liquid state when placed on board the vessel at Manila (Apostles p. 78), by reason of the ordinary temperature there prevailing, and that by reason of the ordinary temperature of the air it must so continue for the greater part of the voyage. It was obvious, therefore, that the libel could not be maintained without amendment (Apostles p. 157), and over the objection, and subject to the exception of respondent, the words "by said heat to liquefy and" were stricken out. (Apostles pp. 30, 157.)

It also appeared at the trial that a large portion of the cargo was not shipped in tank 5, "immediately adjoining the engine room", but was in an entirely separate hold further aft, referred to as hold 7.

The points at issue are, therefore, as we view them, first, the sufficiency of the containers, and, second, the alleged negligence in stowage.

It is, of course, fundamental that a carrier is not ordinarily liable for loss or damage to merchandise due to defective containers.

Carver's Carriage by Sea, 5th Ed., Sec. 14:

"Again, the carrier is not usually liable for loss which results from the defective manner in which the goods are packed; or from defects or insufficiency of the packages which contain them. With such cases, as also where goods are shipped in an unsound or unfit condition, it may be said that the loss has resulted from the inherent defects of the goods themselves. Moreover, where goods are improperly packed, there is a negligence on the part of the shipper of his implied duty to be reasonably careful in shipping them, 'and no person is entitled to claim compensation from others for damages occasioned by his neglecting to do something which it was his duty to do'."

Ordinarily, of course, the burden of proof is upon the carrier to show that the damage was due to the condition of the containers, or that the damage occurred by reason of the inherent quality of the merchandise itself.

Nelson v. Woodruff, 66 U. S. 156; 17 L. Ed. 97.

This, however, is not the case where the claim itself demonstrates that the damage is incident to some cause which is excepted in the bills of lading.

"The Eolima", 212 U. S. 354; 53 L. Ed. 546.

The idiosyncrasies of cocoanut oil and other non-viscous fats with reference to their containers are well known. They have been the subject of judicial observation on numerous occasions from an early day.

In

"The Dunbritton", 73 Fed. 352,
the court says (p. 363):

"Undoubtedly Ceylon (cocoanut) oil, partly by reason of its inherent quality, and partly because

of bad cooperage, always leaks greatly from the casks."

And Judge Adams, in

"The Claverburn", 147 Fed. 850,
says (p. 852):

"The testimony so far shows that this kind of oil possesses drying qualities, and has a tendency to shrink the barrels, to render the wood brittle, *and almost invariably causes the barrels to leak and drain heavy when carried in large shipments.*"

And the Supreme Court in

Nelson v. Woodruff, *supra*,
discusses the subject at length with reference to lard oil:

"When the contents of such barrels are solidified, the leakage will be small; when liquified, large.
* * * From its liquidity, the ordinary barrels for the transportation of tallow and grease were found to be insufficient, as the casks were frequently half empty on their arrival. The commerce in it was checked for some years, and not resumed until the shippers put it into square boxes lined with tin, and the article is now carried without loss. * * * We have now shown that a cause of the leakage of lard is its liquefaction under temperatures higher than those at which it will solidify, when deficient in stearine. One legal consequence of this fact is that *shippers of that article should be considered as doing so very much as to leakage at their own risks when it is in a liquid state*, however that may have been caused, either from fire or the heat of the sun, and knowing, too, that it was to be carried by sea at a time from places where there was a high range of heat, through latitudes where the heat would not be less, until the ship had made more than three-fourths of her passage."

The testimony in this case confirms the foregoing. The witness Murray, a marine surveyor, testified that the oil itself caused a shrinkage in a wooden container. (Apostles p. 105.)

“Q. In all this observation, did you observe and form any conclusion as to what effect, if any, cocoanut oil would have upon a pine barrel?

A. Well, I don't know as it is any difference in the effect on a pine barrel or hardwood barrel.

Q. What is the effect, if any?

A. The general result is there is shrinking.

Q. The oil itself causes the shrinking?

A. The shrinking of the container.”

Captain Curtis, one of the best known surveyors in the port, said (Apostles p. 113):

“Q. Have you formed any opinion, by reason of your experience, of the effect, if any, of cocoanut oil upon a pine barrel?

A. Yes, I have formed the opinion that cocoanut oil shrinks pine barrels.”

And again (Apostles p. 284):

“A. I do not know of any wooden barrel that will hold cocoanut oil that I would guarantee would hold cocoanut oil on an under-deck vessel across the Pacific.”

McCarthy, an old experienced dockman says (Apostles p. 125):

“Q. Did you ever see cocoanut oil unloaded before?

A. I did with the Pacific Mail.

Q. Did you ever see a perfect shipment?

A. No. I saw one shipment come out of the Pacific Mail boats as bad as this shipment, every bit as bad, and every other shipment there was more or less leakage.”

The explanation of the causes of this shrinkage and leakage was furnished by Mr. Sanborn, a chemist, as follows (Apostles p. 120):

“Q. You have heard the testimony that oil containers shrink, wooden barrels, pine barrels?

A. I have.

Q. From your chemical experience, Mr. Sanborn, can you give us any information as to why that could occur, if it does occur?

A. All barrels in a commercial condition, so to speak, that is, as they would be met with in commerce, have more or less water in the wood fibre, and water in contact with cellular material of all kinds tends to swell it; there is a quasi-chemical combination takes place there, so that the volume of the whole is much greater than the sum of the volumes of water and wood separately; that combination does not take place in the case of oil, and consequently when the water of a wood is driven out by one cause or another and is replaced by oil, there will be shrinkage. In other words, the sum of the volume of the oil and the volume of the wood would practically represent the volume of the two in combination.

Q. And there is an apparent shrinkage?

A. Yes.”

In view of the foregoing, the significance of the amendment to the libel will now become apparent. It will be remembered that the original libel alleged that the oil was negligently stowed in hold 5, immediately aft the engine room, a place of alleged excessive heat, and that “*said cocoanut oil was caused by said heat to liquefy and to escape from the barrels in which the same was contained.*” If that had been the fact, a substantial question might have been presented to the court, whether in view of such fact the exception

against leakage contained in the bill of lading would be effective; but such is not the fact. The cocoanut oil was put on board at Manila in a liquid state, during the hottest period of the year.

T. Ota said (Apostles p. 210):

“A. I cannot give you the degrees of heat, but it was the hottest season of the year.”

Then reading from the log-book:

“A. On July 8, that is, the date of sailing from Manila, was 87°.”

Between the 8th and the 31st of July (as the testimony on this point shows, Apostles p. 211) the temperature varied from 94° down to a minimum of 75°, with the average in the eighties.

Cocoanut oil becomes solidified at about 65°. (Sanborn, Apostles p. 121.)

Immediately it became obvious that the cocoanut oil did not become liquid by any act of respondents, but, on the contrary, was liquid when put on board, and remained liquid by reason of natural heat; it necessarily followed that the libel must fall.

We do not make so much a point of the amendment of the libel and the exceptions thereto (Apostles pp. 30, 157) as to emphasize the fact that libellant's damage was caused by natural heat and their own negligence in not providing sufficient containers in the light of this circumstance.

This testimony falls directly in line with the observations of the Supreme Court in *Nelson v. Woodruff*,

supra. The parallel of the two cases is remarkable. In the Nelson case the oil was put on board in a liquid state at the hottest period of the year. The testimony in that case shows that the lard, when liquid, did shrink the barrels and escape. The court there held that even in the absence of an exception in the bill of lading as to the damage by leakage, that there could be no recovery.

So much for deductive argument. Let us approach the case from an empirical standpoint. The testimony describes without contradiction that some of the barrels came off the ship full, some half empty, and some empty. *This must prove instantaneously and conclusively that those barrels which were full were of sufficient strength, those which were half full were only partly sufficient, and those which were empty were insufficient.*

Dunn, witness for libelant, testifies (Apostles p. 290):

“Q. Did you go up alongside the barrels as they came out of No. 5 tank?

A. Yes.

Q. Some of them had the heads stove in?

A. Yes.

Q. There were various conditions of fullness?

A. Yes.

Q. Some empty, were they?

A. *Some empty.*

Q. Some half full?

A. *Some half full.*

Q. *And some full?*

A. *Exactly.”*

Barry testifies (Apostles p. 129):

“Q. What was the condition of the barrels that came out of No. 5?

A. They were pretty nearly the same as No. 7, all leaking.

Q. All leaking?

A. Yes.

Q. Some empty?

A. Some empty, yes.

Q. And some full?

A. Some full."

Witness Chapin testifies (Apostles p. 99):

"Q. The condition was substantially the same?

A. All down the line, yes.

Q. Some barrels were full?

A. *Some barrels were full.*

Q. And some empty?

A. *Some empty, some partly empty."*

The inevitable inference is that the barrels which came off full were sufficient, and that those which came off empty or partially empty were insufficient.

So as not to rely only upon even an inevitable inference, however, the witnesses testify to the same effect.

Captain Curtis testifies (Apostles p. 282):

"Q. If a cargo of cocoanut oil comes out of holds 5 and 7, some with the barrels full, some empty, and some partially full, what does that indicate, in your mind?

A. That some of the containers were not good enough."

And again, Witness Murray testifies (Apostles p. 278):

"Q. Assume, Mr. Murray, that the cargo of cocoanut oil stowed in barrels in both hold 5 and hold 7, some of them came out empty, some partially empty, and some full, what explanation would you give for that? * * *

A. That the barrels that retained their contents possessed sufficient strength for the purpose for which they were intended, and those that did not retain their contents lacked the strength. * * *

That the barrels were found there, some partially full, others empty, and others apparently entirely full, in my opinion, is evidence that some of the barrels contained the requisite strength in all parts, some of them only in parts, and some of them lacked the strength where they needed it most."

Without the exceptions noted in the bill of lading therefor, we believe it conclusively established, both deductively and empirically, that the barrels were insufficient in strength, in view of the peculiar character of the commodity. This would be so even though the burden were upon the respondent to prove the insufficiency of the containers, but where the bill of lading contains an exception of damage by leakage, then the result simply is that the libelant has not sustained the burden.

In view of what we have just said, discussion of negligent stowage would seem to be entirely supererogatory. The fact that some of the barrels came out full necessarily conclusively establishes the fact that the stowage was sufficient, provided the containers were sufficient. This inference is also substantiated by testimony.

Captain Curtis testifies (Apostles pp. 282, 285):

"Q. Will you then say that despite the fact that there was no ventilation in No. 5 tank, and that it was air-tight, it is a good place for the stowage of cocoanut oil?

A. If the containers are good enough to carry it, it will carry it in No. 5 tank, in No. 7 tank, in No. 1 hold—if it is a good container it will carry the oil; if it is not a good container it will leak wherever you put it. * * * I do not think that the fact that it was in No. 5 tank had anything to do with the leakage. * * * No, I think No. 5 tank is all right to stow cocoanut oil in provided the containers are good.

Q. Despite the fact that it has not any ventilation or air?

A. It does not make any difference if the container is good. * * * Good enough to hold its contents. * * *

A. I think if the containers, the wooden barrels, are thoroughly seasoned, and are in good condition, tight, when they go on board the vessel, you can just as properly stow them in No. 5 tank as any other part of the vessel.

Q. Without any air?

A. Without any air.

Q. Without any ventilation?

A. I am taking into consideration all of the conditions of No. 5 tank when I say that."

We have, however, positive proof from libelant's own witnesses that the stowage in tank 5 was sufficient for the purpose. As already remarked, it was early discovered that a portion of the cargo was stowed in hold 7. Libelant's own witnesses testified that stowage in hold 7 was good and sufficient stowage.

Rinder, libelant's witness, testifies (Apostles p. 56):

"A. No, No. 7 hold is all right for stowing anything of that sort."

Captain Brown, also called for libelant, testifies (Apostles p. 90):

“Q. Would hold 7 be a suitable place, do you think, for cargo requiring ventilation?

A. Yes, because it has ventilators in there leading through.”

Now, as a matter of fact, the barrels coming from hold 7 were in the same condition as those coming from hold 5, that is to say, some were full, some partially full, and some empty. The inevitable inference is that if hold 7 was good stowage, as testified by libellant’s witnesses, then hold 5 was likewise good stowage. The stevedores who discharged the cargo testified that the condition of the oil coming from each hold was the same.

McCarthy testifies (Apostles p. 124):

“Q. What was the condition of the oil as it came out?

A. It was in very bad condition.

Q. Out of 5, was it?

A. Yes, out of both hatches, in bad condition.

Q. Out of 7, too?

A. Yes.”

Barry testifies (Apostles p. 129):

“Q. What holds were they in?

A. No. 5 and 7, 5 tank and 7 hold.

Q. What was the condition of the barrels that came out of No. 5?

A. They were pretty near the same as No. 7, all leaking.

Q. All leaking?

A. Yes.

Q. Some empty?

A. Some empty, yes.

Q. And some full?

A. Some full; the hoops were loose on them; we used to hammer the hoops down with our hooks.”

In other words, we simply establish the fact that the leakage of cocoanut oil from pine barrels is not a matter of stowage at all, but a matter of the containers and the commodity itself. That is to say, as the Supreme Court remarks, it can not safely be shipped commercially except in tin-lined barrels, or, as was remarked by Judge Adams in "The Claverburn", in metal drums.

It is also claimed by libelant that, after leaking, the oil ran into the scuppers and then into the bilges, and that it could be thence reclaimed. It seems unnecessary to go into this subject elaborately. The evidence establishes that the oil did go from tanks 5 and 7 to No. 10 bilge (Apostles p. 267), and that there was no place between tank 5 and the bilge where the oil could be plugged (Apostles p. 268), nor could the oil have been reclaimed after it reached No. 10 bilge, for the pumping of the bilges could not be stopped (Apostles p. 270). As a matter of fact the leakage of the oil was not discovered. It is claimed that it might have been discovered by sounding the bilges, but the fact is that the engine room oil drained into the same bilges (Apostles p. 269). Therefore the sounding rod would necessarily show oil (Apostles p. 270), and this engine room oil could not be distinguished from cocoanut oil (Apostles p. 264).

We respectfully submit, therefore, first, that the burden was on libelants to establish the sufficiency of the

containers; second, that the very fact that some of the containers retained the oil, while some did not, proves that those which did not were insufficient; third, that stowage in hold 5, according to libelant's own witnesses, was proper stowage; and fourth, that there is no evidence that the oil could have been reclaimed at any point.

Dated, San Francisco,
February 19, 1921.

KNIGHT, BOLAND, HUTCHINSON & CHRISTIN,
F. ELDRED BOLAND,

Proctors for Appellants.

3610

No. 3601

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

TOYO KISEN KAISHA (a corporation), as claimant of the Japanese Steamship "KOREA MARU", her engines, boilers, boats, tackle, apparel and furniture, and UNITED STATES FIDELITY & GUARANTY COMPANY (her stipulator),

Appellants,

vs.

CHARLES D. WILLITS and I. L. PATTERSON, copartners doing business under the firm name of WILLITS AND PATTERSON,

Appellees.

BRIEF FOR APPELLEES.

EDWARD J. McCUTCHEN,

FARNHAM P. GRIFFITHS,

McCUTCHEN, WILLARD, MANNON & GREENE,

Proctors for Appellees.

FILED

MAY 20

U. S. CIRCUIT COURT
NINTH CIRCUIT

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No. 3601

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

TOYO KISEN KAISHA (a corporation), as claimant of the Japanese Steamship "KOREA MARU", her engines, boilers, boats, tackle, apparel and furniture, and UNITED STATES FIDELITY & GUARANTY COMPANY (her stipulator),

Appellants,

vs.

CHARLES D. WILLITS and I. L. PATTERSON, copartners doing business under the firm name of WILLITS AND PATTERSON,

Appellees.

BRIEF FOR APPELLEES.

Statement of the Case.

On or about July 7, 1917, appellees delivered to the Japanese Steamer "Korea Maru", at the port of Manila, 542 barrels of cocoanut oil, for transportation to the Port of San Francisco. Four hundred and forty barrels were stowed in a compartment known as No. 5 tank; the balance of 102 barrels was stowed in No. 7

hold. During the voyage a great quantity of the oil escaped from the barrels stowed in No. 5 tank. This oil found its way into the ship's bilges, through her scuppers, and was pumped overboard.

Appellees contend, and the lower court found as a fact, that the stowage of the barrels of oil in No. 5 tank was negligent and improper. Most of the barrels in that compartment had shrunk during the voyage; the hoops were off some of them and the heads of many of them were broken.

It is admitted that the oil, when received by the ship, was in good order and condition, and in liquid form. The record shows that 245,717 pounds of oil were delivered to the vessel, and that 143,664 pounds only were discharged at San Francisco. The ship failed to account for the loss of 102,053 pounds of the oil. One per cent was found to be the normal leakage in shipments of cocoanut oil in barrels. Such normal leakage, according to the finding of the trial court, occurred in No. 7 hold, where the 102 barrels were stowed. That percentage of 2457 pounds, was in this case deducted from the entire shipment, leaving a shortage of 99,596 pounds of oil, for the value of which the court below found appellant liable.

Some months after the arrival of the vessel at the Port of San Francisco a quantity of oil, said to have been subsequently taken from the ship's bilges, was tendered to appellees on account of the shortage. \$1140.73 was realized on account of the sale of this latter oil, and credit was given to appellant for that

sum. A decree for the value of the oil lost, less the aforesaid average leakage on the entire shipment, and the aforesaid credit of \$1140.73, was duly entered against the ship. Thereafter this appeal was taken by her owner.

Questions of fact only are presented on this appeal. They were resolved against the appellant by the trial court, in an opinion fully supported by the evidence taken in open court.

Argument.

I.

This is not a case in which the ship's conduct entitles it to much consideration. It may be that cocoa-nut oil is susceptible to leakage, and therefore requires special care in its custody and stowage in transit, and that in some cases a vessel which does its best by careful attention to the stowage and vigilant ventilation may ask a court to find the leakage to be due to defective containers, or the inherent qualities of the oil. But the "Korea Maru's" conduct was not meritorious. She accepted for carriage, at very high freight, a commodity which she admits needed special care against leakage, and, so far from giving such special care, placed it in the compartment of the ship most calculated to promote leakage, namely, the No. 5 tank.

Number 5 tank may fairly be described as a furnace. This compartment is directly abaft the engine-room, and is separated from it by a steel bulkhead. It is also

raised off the floor of the thrust recess, a part of the engine-room, and is separated therefrom by a steel floor (58)*. On each side are the fresh water tanks, and separating those tanks from the compartment in which the oil was stowed are wooden bulkheads, thus making a square compartment. Through it two steel man escapes pass (58). They also serve as out-take ventilators, by means of which the hot air from the engine-room passes to the top deck and out of the vessel (67). This hot air passing through the escapes heats them (68) and if the large doors opening from them into the compartment were open, as testified to by the ship's officers, all of the hot air leaving the engine-room would naturally rise, pass through them into the compartment, and practically make a furnace out of it (58-68,69). One of the tanks separated from the compartment by the wooden bulkhead contained hot water (58, 68). A portion of the hatch opening from the weather deck opened into this compartment through the 'tween decks. Upon this voyage the hatch-covers were on the 'tween decks hatch and about seven feet of cargo was stowed on top of them (172-224, 225).

It is clear, then, that this cargo compartment, which was loaded to capacity with cocoanut oil (215) was completely enclosed (67, 76) and surrounded, at one end by heat from the engine-room, at the bottom by heat from the steel floor separating it from the engine-room, and on the side by heat from the hot-water tank. In addition, excessive heat from the engine room was

*Reference is to page in apostles. Similar references will be used throughout.

at all times either passing through the man escapes located in the tank, or it was, on the testimony of the ship's officers, actually passing from the engine-room up those escapes, through the open doors, and into the compartment.

Cocoanut oil should be stowed in a cool place and given ventilation. It should not be subjected to heat.

Ventilation is imperative for the proper stowage of cocoanut oil. The strongest argument in support of that contention is the extremes to which the ship's officers went in testifying to the ventilation of No. 5 tank, in their endeavor to show that that compartment would receive ample ventilation on the voyage. They admitted that ventilation was necessary for such cargo. Captain Ota testified upon that point as follows:

“Q. In your opinion, is oil cargo that requires a great deal of ventilation?

A. It largely depends upon the kinds of oils you accept as cargo, *but any cocoanut oil, I think it is better to give air ventilation.*” (228, 9)

The chief officer of the vessel gave similar testimony (170, 171).

The testimony of Captain Rinder (39), and Mr. Murray (139) is to the same effect. In fact, the uncontradicted testimony establishes the imperative necessity of ventilating cocoanut oil. The uncontradicted testimony also shows that such oil should be stowed in a cool place where it will not be subjected to heat (54, 109, 116, 123).

Upon this subject, the chief officer testified as follows:

“Q. Cocoanut oil is a cargo that requires a cool space, does it not?

A. A cooler space is better.

Q. Particularly so in hot weather?

A. Yes, it is.” (170, 1)

See also the letter of the chief officer, addressed to ship’s agent.*

It is apparent, therefore, that cocoanut oil requires stowage in a cool place, with ventilation.

In considering the propriety of the stowage of the oil in No. 5 tank, the court should bear in mind that the appellant accepted the oil for transportation with knowledge of the admitted fact that it required special care in stowage. The language of this court in

The Aki Maru, 255 Fed. 721, 3,

is applicable. It was there said:

“The carrier having accepted the eggs, and it being plain that eggs are a kind of freight which requires special care in stowage, we inquire whether the lower hold No. 5 hatch was a proper place to stow the eggs.”

II.

THE STOWAGE OF 440 BARRELS OF THE COCOANUT OIL IN No. 5 TANK WAS IMPROPER.

This compartment was without ventilation.

The uncontradicted testimony shows that tank No. 5 did not have any ventilation. The following appears in the record:

*Libellant’s Exhibit 8, on file in this court as an original exhibit.

“Q. Captain, assume that the hatch boards are on No. 5 tank, and the steel door opening into the tank from the emergency escapes is closed and bolted, and cargo is stowed on top of the hatch boards to a height of seven feet, is there any possible chance for air to get into that compartment?”

A. Absolutely none; it then becomes airtight.”
(86)

Similar testimony was also given by other experts who were familiar with this compartment (37, 38, 58, 69). The absence of ventilation is conclusively proved by the testimony of Captain Curtis, appellant’s witness (117).

Tank No. 5 was subjected to excessive heat.

This compartment was not only without ventilation, but it was also subjected to excessive heat. The testimony makes that fact clear. Upon this point, Captain Rinder testified:

“Q. Captain, assume that the fresh water tanks alongside of the No. 5 tank had hot water in them, would that have a tendency to heat No. 5 tank?”

A. Certainly; the hot water tanks on each side are bound to heat it. (39, 40)

* * * * *

Q. Would the hot air passing from the engine, through these emergency escapes, have a tendency to heat that compartment?

A. Certainly; it would heat the four sides of the steel escape. (40)

* * * * *

Q. Your statement that hold No. 5 was an improper place is based upon what?

A. My practical knowledge of the heat that would be generated from the engine-room all around that compartment.” (43)

The testimony of Captain Lehnhardt, a man who sailed in the "Korea Maru" in all positions from carpenter to second mate, conclusively shows that No. 5 tank was practically a furnace. His convincing testimony follows:

"Q. Is there any heat in that compartment from the engine-room?

A. Yes, it comes up through the escapes; it is right over the engine-room, the after part of the engine-room.

Q. Would any hot air passing through those emergency escapes from the engine-room heat the steel sides of those escapes?

A. Yes, naturally; the deck would be hot, too.

Q. The deck would be hot as well?

A. Yes.

Q. That is the steel deck?

A. That is, the bottom of No. 5 tank? A. Yes."

(58)

A vivid description of the compartment, and of the manner in which it is subjected to excessive heat, was also given by Captain Rudden, a master of considerable experience, who was chief officer of the "Korea Maru" for several years. He testified as follows:

"Q. Has the engine-room any effect upon No. 5 tank with respect to heat?

A. It certainly has.

Q. If this door appearing on the emergency escape of No. 5 of Exhibit 2 were closed, Captain, would the hot air passing through it have any effect on the steel emergency escape?

A. On the four sides of it, yes.

Q. What effect would it have?

A. It would heat it.

Q. If that door appearing in Libellant's Exhibit 2 were open, Captain, on the voyage from Manila to San Francisco, as testified to by the master and

first officer of this ship, what sort of air would enter No. 5 tank from those doors.

A. You would have excessive heat.

Q. What sort of air would get in there?

A. Excessive heat.

Q. What sort of air would get in there?

A. Hot air.

* * * * *

Q. Would the heat of the engine room on the floor of that No. 5 tank have any effect upon heating No. 5 tank?

A. Yes.

Q. Then that tank is practically surrounded by heat?

A. It is completely surrounded by heat, except on the ship's sides." (68, 69)

It is obvious that the witness was referring to the skin of the ship when saying "on the ship's sides". These sides were some twenty-five feet away from the wooden bulkhead separating the fresh water tanks from the compartment in question.

Captain Brown testified to the same effect (86, 87, 88).

Captain Curtis, appellant's witness, testified as follows upon this subject:

"Q. That tank is right directly abaft the engine-room, isn't it?

A. Yes.

Q. Would the heat of the engine room have any effect on that tank?

A. Oh, yes.

Q. What effect would it have on that tank?

A. It would make it warm." (117)

If any doubt existed as to the excessive heat of this compartment on the voyage in question, it was banished by the experience of Captain Rudden when he, in the presence of the ship's representative, and her proctor,

stood in the middle of the tank and held up his hand and found plenty of heat coming from the engine-room bulkhead (69,70). At that time the vessel was lying at her dock, with the hatch-covers off, and the air from above had free access to the hold. In addition, the main engine at that time was not working (73,74). The compartment was then as low in temperature as it ever would be, yet the heat from the engine-room bulkhead was noticeable.

Thus it is conclusively established by the uncontradicted testimony that the compartment in which this oil was stowed was not only without any ventilation but, in addition, was subjected to excessive heat because of its location and its immediate surroundings. The ship's negligence in this respect is magnified by reason of the fact that that furnace was selected by the ship's officers for the stowage of this cocoanut oil at the hottest season of the year (170-210), at a time when hot weather was expected (237), and at a time when the ship ought to have taken extra precautions to give good stowage and ventilation to a cargo known to be peculiarly affected by heat. Such gross negligence can hardly be accounted for except upon the theory that the ship's officers thought they could stow the oil anywhere inasmuch as the bill of lading contained the usual provision that the ship would not be liable for leakage.

This compartment was an improper place for the stowage of cocoanut oil.

Appellant has refrained from discussing the propriety of the stowage of the oil in tank No. 5. The

testimony shows that one finding only is possible upon that question. It is the finding of fact made by the trial court—that the stowage of the oil in that compartment was improper. We quote the testimony:

Captain Rinder testified:

“Q. In your opinion, was that a proper place to stow cocoanut oil?

A. No.

* * * * *

A. I say certainly not. (39)

Q. Will you explain your answer?

A. No. 5 tank, as now constructed, in my opinion is not fit to carry anything that would be damaged by heat, excessive heat that would come in hot weather, going through the tropics as this ship does, from the engine room.” (55)

Captain Lehnhardt testified as follows:

“Q. What is your opinion, Captain, with respect to the question as to whether No. 5 tank is a proper place for the stowage of any cargo that requires ventilation?

A. A poor place for it. (60)

* * * * *

Q. *Could they find a worse place on that ship for the stowage of cargo that required ventilation than No. 5 tank?*

A. No.” (60)

Captain Rudden, a ship master, who not only had considerable experience as chief officer in loading vessels, including the “Korea Maru”, but who for several years was in charge of the stevedoring of the Pacific Mail S. S. Company’s fleet, testified as follows:

“Q. In your opinion, is that No. 5 tank a fit place to carry any cargo that requires ventilation?

A. No, it is not a fit place.

Q. Is it suitable for the carriage of cocoanut oil?

A. I should say not." (73)

The testimony of Captain Brown (88) and Mr. Gaster (64) is to the same effect.

The record persuasively establishes the unfitness of No. 5 tank as a place for the stowage of cocoanut oil. It would be wrong to stow cocoanut oil in a place beyond the reach of ventilation, even if such place were not adjacent to the engine-room or hot water tank. It was doubly wrong where such place was so adjacent, and it was trebly wrong where, as in this case, the doors opening from the engine-room into No. 5 tank were actually avenues of inlet into the compartment from the engine-room; not ventilators at all, as the ship's officers falsely testified them to be.

In other words, we have here a compartment heated, first, by its juxtaposition to the engine-room and hot water tank, and, secondly, by the pouring into it of hot air from the engine-room out-takes, without any provision whatsoever for ventilation. In these circumstances, the findings of the trial court that

"Tank No. 5 was the hottest place on the ship used for the stowage of the cargo" * * *

and that it

"* * * was an improper place for the carriage of this oil"

should not be disturbed by this court.

III.

THE EFFECT OF HEAT ON COCOANUT OIL IN BARRELS.

The testimony shows that heat causes oil to expand and the containers to shrink.

Mr. Tompkins, an industrial chemist of twenty-four years' experience, testified that heat had various effects on oil.

"* * * one is expansion; it depends on the temperature that the cocoanut oil is subjected to.

Q. A greater temperature has a tendency—the higher the temperature goes the greater the tendency to expand?

A. The higher the temperature the greater the expansion, yes." (144)

Similar testimony was given by Mr. Sanborn, appellant's witness (122, 123).

Captain Curtis also said that the heat would affect the oil (116); so did Mr. Murray (109), all of whom were witnesses on behalf of appellant.

Captain Rudden's testimony upon this subject is convincing.

"Q. Will you explain why it is that heat causes leakage?

A. Oil expands.

A. Oil expands under heat?

A. Yes, and dries up the barrels—warps the barrels.

* * * * *

Q. Then your assumption, to that extent, is based upon what, that the oil expands under heat?

A. Any kind of oil will expand under heat.

* * * * *

A. I said excessive heat would cause the barrels to shrink." (80, 81)

Upon the testimony of appellant's witnesses on this subject, the lower court very rightly found that cocoanut oil should not be subjected to heat, the effect of which, as is shown by the uncontradicted testimony of Mr. Tompkins, is to cause the oil to expand.

The effect of heat on the barrels.

The uncontradicted testimony likewise proves that heat shrinks the barrels.

Mr. Broderick, the expert of the California Barrel Company, in testifying upon this subject, said:

"Q. Mr. Broderick, has heat any effect upon a barrel?

A. Yes.

Q. On any kind of a barrel?

A. Yes.

Q. What effect has it?

* * * * *

A. Heat would have the effect of shrinking the barrels." (140)

Captain Rinder, in speaking of the effect of heat, said:

"Of course, the barrels shrink and the hoops will loosen up." (45)

Captain Curtis, when asked as to whether heat had any effect upon barrels, testified as follows:

"Q. Has it any effect on the barrels, that you know of?

A. On empty barrels, or full barrels?

Q. On full barrels, and if so, what is the effect?

A. I think it will shrink a barrel—heat will shrink a barrel.

Q. Do you think it will?

A. Yes." (284, 5)

The effect of heat on these barrels is evidenced by their condition when discharged. Hoops were off, the barrels had shrunk, and some of the heads were broken.

The combined effect of the heat upon the barrels and the oil, is bound, Captain Rudden says, to cause excessive leakage (80).

Mr. Murray's views are in accord with those of Captain Rudden. He testified:

“Well, I would be inclined to say that the combined effect of the heat on the oil and the barrels renders it susceptible to seepage.” (109, 110)

Obviously, if heat causes the oil to expand, and the barrels to shrink, as the testimony shows it does, excessive leakage is inevitable.

With what grace can a vessel, guilty of placing a cargo susceptible to leakage by heat, in the compartment described, ask the consideration of this court merely because the loss was due to leakage, or because wooden containers sometimes leak?

By accepting such cargo in wooden barrels, the condition of which was apparent at the time of acceptance, the ship owner obligated itself to give it the special care required. As said by the court in

Doherr v. Houston, 123 Fed. 334, 5,

“In view of such knowledge, and their acceptance of the goods, it was incumbent upon the respondents to stow them in such places and in such manner that they would not be injured by the ordinary contingencies of the voyage.”

In

The San Guglielmo, 241 Fed. 969, 977,

the court said:

a "carrier who accepts goods of a nature which requires special care in their stowage, must exercise such care, and, failing so to do, is liable for the damage caused thereby".

A common carrier is an insurer of the place selected by it for the stowage of such cargo, and must answer for all the consequences to which its negligence contributes. Appellant is, under the conditions existing in this case, within the condemnation of the following authorities.

"If the danger might have been thus avoided, it is plain that the loss should be attributed to the negligence and inattention of the Company, and it should be held liable, notwithstanding the exception in the bill of lading."

Western Transp. Co. v. Downer, 11 Wall. 129, 133.

"A shipowner will not be exonerated from losses arising from any of these accepted causes when there has been any neglect on his part to take all reasonable steps to avoid them; or to guard against their possible effects; or to arrest their consequences."

Carver on Carriage by Sea, Sec. 16, 6th Ed.

"where the owner's negligence has made that danger operative, the exception of 'danger of the seas', or 'sea perils', in a bill of lading will not avail the owner, because he remains liable for that negligence, as the efficient cause, or causa causans, producing the loss."

The Manitoba, 104 Fed. 145, 153, 4.

See also

The Regulus, 18 Fed. 380-382;

Astsrup v. Lewy, 19 Fed. 536;

The Saratoga, 20 Fed. 869-871;

The Victoria, 114 Fed. 962;

The Jeanie, 236 Fed. 463-472;

Liverpool & Great Western Steam Co. v. Phoenix Ins. Co., 129 U. S. 397.

The obvious negligence of appellant in stowing the oil in No. 5 tank contributed directly to the excessive leakage. That is perfectly evident. Under the authorities, its negligence is therefore the proximate cause of the loss.

As the court said in

Gulden et al. v. Hijos, etc., 243 Fed. 780,

“In the case at bar the evidence shows such stowage that leakage was likely, and of itself might cause the conditions resulting in damage * * *. But the bad stowage in this case would be the proximate cause.”

IV.

THE OIL STOWED IN No. 7 HOLD WAS DISCHARGED IN GOOD ORDER AND CONDITION.

Obviously guilty of conscience, and unable to justify placing wooden barrels of cocoanut oil in the very compartment of the ship where heat to an excessive degree was sure to be generated, appellant, for defense, attempts a showing that its negligence is excused by the outcome, but the outcome was not as appellant contends. Its defense is predicated upon

the *false premise* that the oil stowed in No. 7 hold leaked out of the barrels there in the same manner and to the same extent as did the oil that was stowed in No. 5 tank. That was not so, even upon the testimony of appellant's own witnesses. *The testimony of the ship's officers conclusively proves that the oil was discharged from No. 7 hold in good order and condition.* Their testimony, together with that of Mr. Boyer and Mr. Dunn, should outweigh the unsatisfactory testimony of the stevedores referred to in appellant's brief, who could not remember anything about the case other than a general notion that the oil from both holds was in the same condition. None of these stevedores could tell anything about the quantity of the cargo in either hold. They were not employed on the ship in the handling of the cargo from either hold.* They were not stationed in the vicinity of either hold. They were sorters on the dock not engaged to look after any particular cargo. Their duties carried them all over the wharf, sorting all kinds of cargo discharged from the vessel. Hence they had no opportunity to observe the condition of the oil from No. 7 hold. On the other hand, Mr. Dunn, who actually saw the oil in No. 7, and Mr. Boyer, who actually saw the cargo discharged from No. 7, and the ship's master and chief officer, all testified that the oil in No. 7 was in good order and condition. Their testimony upon this subject is conclusive

*Not one stevedore who actually assisted in the discharge of the oil from No. 7 hold was called by appellant. One of them was still in appellant's employ at the time of the trial (136). Instead, dock sorters, still in appellant's employ, were rushed out to court on the day of the trial to testify at the last minute as to facts about which they manifestly were ignorant.

and amply sustains the finding of fact made by the trial court upon this point. We quote the testimony:

Captain Ota testified:

“Q. What was the condition of the cargo in No. 7 hold when you arrived in San Francisco?

A. The conditions were good. (233, 234)

Q. Upon arrival in San Francisco, Captain, what was the condition of the barrels in No. 5?

A. The conditions were bad. * * *” (233)

The chief engineer of the vessel also stated that the leakage was from No. 5 tank (289).

Again referring to the letter of the ship's chief officer,* we find that he there states that the damage occurred in No. 5 tank. In that letter the following appears:

“I understand that much leakage found when discharging the cargo at San Francisco was from the barrels which were stowed in No. 5 hold.”

Not a word about leakage or damage in No. 7 hold!

Mr. Boyer testified as follows with reference to the condition of oil in both compartments:

“Q. Do you remember the condition in which the cargo came out of No. 5 tank?

A. I do.

Q. Will you describe it?

A. It was in very bad condition.

Q. What condition were the barrels in?

A. Leaking very badly.

Q. What physical condition were the barrels in?

A. The hoops were off of some of them, a good many of the hoops, and the staves broken in.

* * * * *

*Libelant's Exhibit "8".

Q. Did you see the barrels that came out of No. 7, Mr. Boyer?

A. I did.

Q. What condition were they in?

A. They were in good condition." (93, 94)

Mr. Dunn, appellant's head stevedore, testified that the barrels in No. 7 hold were in good order and condition. His testimony follows:

"Q. Did you see the barrels of cocoanut oil in that shipment that were stowed in No. 5 tank?

A. I did.

Q. When did you see that with respect to the discharge—while they were discharging it?

A. While they were discharging it.

Q. What condition was that oil in No. 5 tank in?

A. In very poor condition, the barrels leaking.

Q. Will you describe the condition of the barrels as you observed them in No. 5 tank?

A. I remember distinctly that they were leaking very badly. As a matter of fact, my attention was called to the fact that they had got into the oil and I was asked by either the fireman or one of the head assorters to go down and look at the condition of the oil as it came out of the ship.

Q. What did you notice about the barrels?

A. Particularly, that they were open and were leaking—that the oil was leaking out of them.

Q. Did you or did you not notice whether or not any of the heads were off the barrels?

A. I am inclined to think that there were heads off the barrels, that is, some of the barrels the latter end of the discharge of the oil—I am quite sure that many of the heads were off.

Q. Did you notice whether or not any of the barrels were broken or stove in?

A. Some of the heads were out of the barrels, yes.

* * * * *

Q. The testimony you have given all relates to the oil that came out of No. 5 tank?

A. Yes.

Q. Did you see the oil in the same shipment that was stowed in No. 7 hold?

A. I saw oil that was stowed in No. 7, but I don't know that it was the same shipment—I would not say positively that it was of the same shipment, but I know that there was oil stowed in No. 7.

Q. What was the condition of that oil in No. 7?

A. I don't remember having seen it being discharged, but I remember standing on the steerage deck by No. 7 when they were discharging freight that had been stowed on top of the oil, and as far as I could see, those barrels were not in bad condition.

Q. Were they in apparent good order and condition?

A. They were apparently in good condition; as I remember, they were only one high on top of the lower hold, that is, the deck." (286-288)

In support of the observation of Mr. Dunn as to the condition of the barrels of oil in No. 7 it may be noted that his recollection of the manner in which they were there stowed is in accord with the testimony of the ship's chief officer. The latter testified that there was one tier only of the barrels in No. 7 hold (165). Thus it is clearly established that his recollection of the conditions existing in No. 7 hold is correct and unanswerable.

If in fact the oil in No. 7 were in the same condition as that discharged from No. 5 tank no one could have failed to observe it. The oil would have been, as it was in No. 5, all over the place. Yet we find the master, the chief officer, the chief engineer, Mr. Dunn and Mr. Boyer, testifying that the oil in No. 7 hold was in good order and condition.

Moreover, other cargo was stowed in No. 7 hold. Is there any evidence of its being damaged by contact with oil? Not a word. Obviously, if the oil in that hold had leaked out of the barrels it would have damaged other cargo stowed there.* The oil would have been running all over the hold.

The soundings indicated, as the chief officer admitted, that the oil was leaking out of the barrels in No. 5 tank. Soundings of the bilges leading from No. 7 hold would also have indicated whether the oil in that hold was leaking. Yet appellant did not offer any evidence on that subject. The reason is obvious. Oil was not found in that bilge.

Written evidence of the condition in which cargo is discharged from various holds of vessels is usually kept by steamship companies. They make such records for their own protection, particularly when cargo is discharged in a damaged condition. Appellant was in the habit of following that usual custom (126). The records kept by it, however, were not produced, despite the fact that a demand was made for them (126). The reason for the refusal is obvious. The failure to produce the record, or to account satisfactorily for not so doing

“is a circumstance which the court cannot fail to observe, in reaching its conclusion.”

The Prudence, 191 Fed. 993.

See also,

The Alpin, 23 Fed. 815;

The New York, 175 U. S. 187.

*Oil was the only cargo in No. 5.

Again, it clearly appears that another finding of the trial court is amply sustained by the evidence. The finding of the trial court that there was merely a normal leakage from the oil in No. 7 hold should not, therefore, be disturbed.

V.

**COCOANUT OIL IN WOODEN BARRELS HAS BEEN SAFELY
TRANSPORTED FOR A GREAT NUMBER OF YEARS.**

Cocoanut oil in wooden containers has been transported to this port for a considerable period of time. In fact, we find it was carried in wooden containers as early as 1864. At that time, in the case of

Koebel v. Saunders, 12 W. R. 1106; 17 C. B.
(N. S.) 71,

it was urged that stowage of such cargo with loose copra was improper because it would be subjected to excessive heat.

Several shipments have also come into this port with copra as broken stowage, and in each and every such case extensive damage resulted because of the excessive heat generated by copra (44). *There have been shipments, however, in which the oil was carried in wooden containers of the proper kind with a normal or "average leakage of one-half of one per cent"* (147). The mere fact that a great number of shipments of oil in wooden containers have arrived at the port of San Francisco with the small average leakage of one-half of one per cent proves that oil may be safely transported in proper and adequate wooden containers, and indicates that the

cause of the damage in this case was bad stowage, not wooden containers, which all the evidence goes to show were in good condition.

Captain Rinder testified that a number of shipments of cocoanut oil have come into this port in wooden barrels in good order and condition (51).

Mr. Boyer, a large importer of cocoanut oil, testified upon this point as follows:

“Q. Mr. Boyer, since your firm has been importing cocoanut oil in San Francisco, have you had any cocoanut oil coming in in good order and condition?

A. I have.

Q. In what kind of barrels did those shipments arrive?

A. The same kind as the ‘Korea’ shipment.

Q. Could you recall some of the ships that carried cocoanut oil which was in good order and condition?

* * * * *

A. I can mention a few, the ‘Puake’, the ‘Melville Dollar’ and the ‘Dix’. I have just those three.

Q. Are there any others whose names you cannot recall now?

A. I think there are; yes” (142-143).

The barrels involved in this shipment were properly treated to protect them from the oil (122-142):

The oil stowed in No. 7 hold, in the same kind of barrels as those which contained the oil in No. 5, as before pointed out, and as found by the trial court, came out in good order and condition. Hence, it follows that wooden containers, of the adequate kind here involved, may safely carry cocoanut oil, *provided they are stowed in a cool place and given ventilation.*

Appellant's brief is silent about much that has been clearly established as facts in this case. Among other matters, it is silent about the fact that the barrels, when accepted by the ship, were not leaking or showing any other evidence of their insufficiency to safely transport the oil* (96, 97, 182, 183). Obviously, if they were able to stand for some time a temperature of ninety degrees in Manila (76), without in any wise showing or indicating leakage, it is pretty strong evidence of their sufficiency to contain the oil if properly stowed. It is also persuasive evidence of the excessive heat to which the barrels were subjected in No. 5 tank.

That some of the barrels in No. 5 tank may have been affected differently is not surprising.* Those barrels which were stowed alongside of the engine-room bulkhead were bound to be subjected to a greater degree of heat than those stowed next to the distant bulkhead separating tank No. 5 from No. 6 hold. Those stowed on the hot steel floor of the tank, directly over the engine-room, were bound to suffer to a greater degree than those stowed not so close to the heat. So with those stowed up against the hot sides of the steel man escapes.

The identical defense urged by appellant in this case was rejected by the court in

The David & Caroline, F. C. 3593.

*The bill of lading also acknowledged receipt of the barrels in good order and condition.

*The testimony as to the extent of the leakage in the various barrels discharged from No. 5 tank is of a most general nature. No witness actually examined any barrel from that compartment to ascertain just how much oil may have escaped.

In reversing the decree of the lower court, Circuit Justice Nelson said:

“But it is insisted by the claimant that the re-torts cased in straw were not in a proper state or condition to be shipped with safety for any considerable voyage; and that, if they had been cased in wood or strips, the damage, even stowed as they were, would not have occurred. But there are two answers to this objection—first, the *carrier should not have received them in this condition*, or, if he chose to do so, he *should have seen to it that they were stowed* with reference to the imperfect state of the covering—and, second, *the proofs show that this is not an uncommon or unusual condition in which these articles are shipped.*”

Realizing the weakness of its case, and its inability to answer the convincing testimony in this case, appellant in defense cites three decisions which it says justifies the reversal of the decree of the lower court; a decree which is based upon the testimony and undisputed facts of this case.

The decisions cited by appellant have no application to the facts of this case. This case must be determined on the evidence before the court. The decisions cited were based upon the evidence before the court in each of them. An examination of them, however, will demonstrate that they are not in point.

Wm. Nelson et al. v. John O. Woodruff et al.,
66 U. S. 156,

involved a shipment of lard. The court found as a fact that the stowage was fit and proper. It determined the case on the evidence before it, and merely held that the recitals of the bill of lading did not prevent the carrier from showing that the loss pro-

ceeded from some cause which existed at the time of shipment,

“* * * which, if shown satisfactorily will discharge the carrier from liability”.

In this case there was no such showing. On the contrary, the finding of fact of the trial court upon the point is against the appellant.

The Dunbritton, 73 Fed. 352,

is likewise inapplicable. There the court was concerned with the propriety of stowage of oil with other general cargo, where the latter might be damaged by the leakage of the oil. The mere fact that there may be average leakage in shipments of cocoanut oil is wholly immaterial in this case. We are not here seeking, and we did not seek in the lower court, a recovery for the normal or average leakage of the oil. On the contrary, a deduction was made by the trial court from the entire shipment on account of the normal leakage.

The decision in

The Claverburn, 147 Fed. 850,

must similarly be read in the light of its facts. The barrels in that case were not, as the court found, of the kind suitable for the safe carriage of the oil.

In the case now before the court, we have the finding of the trial court

“* * * that the barrels were fit and sufficient containers”. (307)

In some later case counsel might cite, with equal propriety, the decision of the trial court in this case,

that the containers were sufficient. As before stated, each decision is applicable to the facts before the court only. The question as to whether or not the containers in any given case are sufficient is one of fact—not law.

VI.

APPELLANT FAILED TO PROPERLY CARE FOR THE OIL DURING THE VOYAGE.

Some of appellant's witnesses falsely testified that it was not known aboard the vessel that the barrels in No. 5 tank were leaking. It has been shown that the chief engineer knew that the oil was leaking from No. 5 tank. Moreover, the ship's officers admitted that soundings were regularly taken. Those soundings, we submit, should have informed the ship's officers of the leakage. Cocoanut oil is easily distinguishable from any other oil (294). It is white (294) and would be quite noticeable on the sounding rod (150). The testimony of the ship's carpenter to the contrary (264) is false.

Knowledge of the fact that the oil was leaking from No. 5 tank, as before stated, was admitted by the chief engineer (289). Despite this knowledge, and the possibility of saving it, no effort was made to prevent the loss of the oil. Instead it was pumped overboard in violation of the duty imposed upon the shipowner to properly care for damaged cargo during the voyage.

The Skipton Castle, 243 Fed. 523.

During all of the time that the barrels in tank No. 5 were known to be leaking, steps could have been taken to prevent any further escape of the oil (150, 151, 232).

The lower court, in view of the conclusion reached by it, did not think it necessary to pass upon this question. Nevertheless, we feel that upon this ground, too, the ship is liable.

VII.

PROVISIONS OF THE BILL OF LADING DO NOT RELIEVE THE APPELLANT FROM LIABILITY.

The bill of lading contained a clause similar to those usually found in all oil shipments. It provided that leakage was at owner's risk.

Such a clause does not protect the ship if the leakage is due to negligence or improper stowage, or even if the negligence merely contributes to the leakage. The decisions upon this point are clear and convincing. The provisions of the bill of lading relied upon by appellant merely placed upon appellees the burden of establishing negligence in the care of the cargo, or in its stowage. It does not of itself exonerate the vessel. This is elementary.

Section 2 of the Harter Act, Sec. 8030 U. S.

Comp. Stats. 1916;

The Mississippi, 113 Fed. 985;

The Manitou, 116 Fed. 60;

The Good Hope, 197 Fed. 149;

The Skipton Castle, 223 Fed. 839;

The Arpillao, 241 Fed. 282;

The San Guglielmo, 241 Fed. 969;

Gulden et al. v. Hijos etc., 243 Fed. 780.

VIII

**SOME OF THE STATEMENTS APPEARING IN APPELLANT'S
BRIEF ARE NOT IN ACCORD WITH FACTS.**

It did not develop on the trial that the oil when shipped was in a liquid state. Long before the trial commenced it was stipulated that the oil, at the time of its receipt by the ship, was in liquid form (95, 96).

Likewise, it did not develop on the trial that 440 barrels of the oil were stowed in No. 5, and the balance in No. 7 hold. This was an admitted fact, at all times known to both parties.

Appellant's intimation that the allegation of the original libel, to the effect that the heat caused the oil to liquify is important or material, is not sound. An allegation in a case against a common carrier as to the manner in which cargo is damaged is wholly immaterial.

Pacific Coast S. S. Co. v. Bancroft-Whitney Co.
et al., 94 Fed. 180;

California-Atlantic S. S. Co. v. Central Door &
Lumber Co., 206 Fed. 5;

Rainey v. New York & P. S. S. Co. Limited,
216 Fed. 449.

Appellee's damage was not caused by "natural heat", as stated on page 7 of appellant's brief. We have previously shown how that damage was caused.

IX.

**THIS IS A PROPER CASE FOR THE APPLICATION OF THE
UNIVERSAL RULE THAT THE FINDINGS OF FACT MADE BY
THE TRIAL COURT WILL NOT BE DISTURBED ON APPEAL,
EXCEPT FOR MANIFEST ERROR.**

The rule in cases on appeal in admiralty, where questions of fact only are presented, is that the decision of the trial court will not be reversed except for manifest error. This well-settled rule has been followed by an unbroken line of authority in this circuit.

The Bailey Gatzert, 179 Fed. 44;

The Dolbadarn Castle, 222 Fed. 838;

The Hardy, 229 Fed. 985;

The Beaver, 253 Fed. 312.

We respectfully submit that the decree of the District Court should be affirmed, with interest and costs.

Dated, San Francisco,

March 1, 1921.

EDWARD J. McCUTCHEN,

FARNHAM P. GRIFFITHS,

McCUTCHEN, WILLARD, MANNON & GREENE,

Proctors for Appellees.

No. 3610

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

TOYO KISEN KAISHA et al.,

Appellants,

vs.

CHARLES D. WILLITS and I. L. PATTERSON et al.,

Appellees.

APPELLANTS' PETITION FOR A REHEARING.

SAMUEL KNIGHT,

F. ELDRED BOLAND,

KNIGHT, BOLAND, HUTCHINSON & CHRISTIN,

Balfour Building, San Francisco,

*Attorneys for Appellants
and Petitioners.*

FILED

AUG 1 1923

F. O. MONTGOMERY
CLERK

No. 3610

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

TOYO KISEN KAISHA et al.,

Appellants,

VS.

CHARLES D. WILLITS and I. L. PATTERSON et al.,

Appellees:

APPELLANTS' PETITION FOR A REHEARING.

*To the Honorable William B. Gilbert, Presiding Judge,
and the Associate Judges of the United States Circuit
Court of Appeals for the Ninth Circuit:*

We respectfully and urgently request a rehearing. We hesitate to suggest that the court overlooked a vital point in the case, but as the opinion does not refer to it, this conclusion is forced upon us.

Appellees claim damages by reason of the leakage of cocoanut oil occurring through the negligence of appellant in stowing the barrels containing the cocoanut oil in a hold too near the engine room of the vessel.

Appellants assert that the leakage occurred through insufficiency of the barrels to retain the oil. *There is*

no discussion of this point in the opinion although it was the point principally discussed in the briefs and argument.

The bill of lading contains an exception against liability for leakage. With such an exception in the bill of lading, a shipper cannot recover damages from a shipowner for leakage, unless he shows that the damage would not have occurred but for the negligence of the shipowner (the "Folima", 212 U. S. 354; 53 L. E. 546).

We respectfully but emphatically assert that the leakage would not have occurred but for the negligence of the appellees in putting the oil in insufficient containers. For this the shipowner is not liable (Carver, Carriage by Sea, Fifth Edition, Section 14). *The uncontradicted evidence establishes that some of the barrels came out of the vessel's hold full, some empty and some partly empty.* The fact that some of the barrels came out *full* conclusively establishes three things as to those barrels: First, that those barrels were sufficiently strong and tight to retain their contents; second, that there was no negligence on the part of appellant Toyo Kisen Kaisha as to the stowage of those barrels, and third, that there was no negligence on the part of the shipper in putting the cocoanut oil in these sufficient containers.

What does that establish as to those barrels which came out *half full* and those which were *empty*? Simply and only that they were not sufficient. If they had

been as strong and tight as the full barrels, they must have come from the hold in the same condition. The conclusion, therefore, is inevitable that no damage could have happened but for the insufficient containers, and for this the shipowner is not liable.

There is no mention in the opinion of this vital and turning point of the case.

The testimony upon the point is uncontradicted. The witnesses testified that some of the barrels came out full, some partly full and some empty.

Dunn, witness for appellees, testifies (Apostles p. 290):

“Q. Did you go up alongside the barrels as they came out of No. 5 tank? A. Yes.

Q. Some of them had the heads stove in?

A. Yes.

Q. There were various conditions of fullness?

A. Yes.

Q. Some empty, were they? A. Some empty.

Q. Some half full? A. Some half full.

Q. And some full? A. Exactly.”

Barry, a stevedore, testifies (Apostles p. 129):

“Q. What was the condition of the barrels that came out of No. 5?

A. They were pretty nearly the same as No. 7, all leaking.

Q. All leaking? A. Yes.

Q. Some empty? A. Some empty, yes.

Q. And some full? A. Some full.”

Witness Chapin testifies (Apostles p. 99):

“Q. The condition was substantially the same?

A. All down the line, yes.

Q. Some barrels were full?

A. Some barrels were full.

Q. And some empty?

A. Some empty, some partly empty."

Of course the inference would seem to be inescapable that the barrels which came out full were sufficient, and that those which came out empty or partially empty were wholly or partially insufficient, but to make assurance doubly sure, the witnesses so testified.

Captain Curtis testifies (Apostles p. 282):

"Q. If a cargo of cocoanut oil comes out of holds 5 and 7, some with the barrels full, some empty, and some partially full, what does that indicate, in your mind?

A. That some of the containers were not good enough."

And again, witness Murray testifies (Apostles p. 278):

"Q. Assume, Mr. Murray, that the cargo of cocoanut oil stowed in barrels in both hold 5 and hold 7, some of them came out empty, some partially empty, and some full, what explanation would you give for that?

A. That the barrels that retained their contents possessed sufficient strength for the purpose for which they were intended, and those that did not retain their contents lacked the strength.

That the barrels were found there, some partially full, others empty, and others apparently entirely full, in my opinion, is evidence that some of the barrels contained the requisite strength in all parts, some of them only in parts, and some of them lacked the strength where they needed it most."

As bearing upon and reinforcing the importance of this point and its vital bearing upon the case of the appellant, we may refer to the statement by the Supreme Court in

Nelson v. Woodruff, 66 U. S. 156; 17 L. Ed. 97, wherein it is virtually held that a shipper of such a commodity in wooden containers assumes the risk of leakage. The court says:

“When the contents of such barrels are solidified, the leakage will be small; when liquified, large.
* * * From its liquidity, the ordinary barrels for the transportation of tallow and grease were found to be insufficient, as the casks were frequently half empty on their arrival. The commerce in it was checked for some years, and not resumed until the shippers put it into square boxes lined with tin, and the article is now carried without loss. * * *
We have now shown that a cause of the leakage of lard is its liquefaction under temperatures higher than those at which it will solidify, when deficient in stearine. One legal consequence of this fact is that shippers of that article should be considered as doing so very much as to leakage at their own risks when it is in a liquid state, however that may have been caused, either from fire or the heat of the sun, and knowing, too, that it was to be carried by sea at a time from places where there was a high range of heat, through latitudes where the heat would not be less, until the ship had made more than three-fourths of her passage.” (The contents of these barrels was liquid when they went on board the vessel.)

We believe this point deserves the fullest consideration and we are confident that the court will not deny

us a deliberate and extended hearing upon so vital a point.

Dated, San Francisco,

August 10, 1921.

SAMUEL KNIGHT,

F. ELDRED BOLAND,

KNIGHT, BOLAND, HUTCHINSON & CHRISTIN,

*Attorneys for Appellants
and Petitioners.*

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellants and petitioners in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,

August 10, 1921.

F. ELDRED BOLAND,

*Of Counsel for Appellants
and Petitioners.*

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

H. C. ANDERSON,

Appellant,

vs.

O. H. AVEY AND PAYETTE VAL-
LEY LAND AND ORCHARD COM-
PANY, LIMITED, a Corporation,

Appellee.

Transcript of Record

*Upon Appeal From the United States District Court
for the District of Idaho, Southern Division.*

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United States Circuit Court of Appeals
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H. C. ANDERSON,

Appellant,

vs.

O. H. AVEY AND PAYETTE VAL-
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PANY, LIMITED, a Corporation,

Appellee.

Transcript of Record

*Upon Appeal From the United States District Court
for the District of Idaho, Southern Division.*

NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD:

HAWLEY & HAWLEY,
Boise, Idaho.

JOHN H. NORRIS,
Payette, Idaho.
Attorneys for Appellants.

RICHARDS & HAGA,
Boise, Idaho.

THOMPSON & BICKNELL,
Caldwell, Idaho.
Attorneys for Appellees.

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*In the District Court of the United States for the
District of Idaho, Southern Division.*

H. C. ANDERSON,

Plaintiff,

vs.

O. H. AVEY and PAYETTE
VALLEY LAND AND OR-
CHARD COMPANY, LIM-
ITED, a Corporation,

Defendants.

In Equity 644.

BILL OF EXCEPTIONS.

BE IT REMEMBERED, That in the foregoing cause the following proceedings were had, to-wit:

1. The complaint of plaintiff was filed with the Clerk of said Court in the following words, omitting the title of court and cause which is identical with the title of this bill of exceptions:

“COMES NOW, The complainant herein, and complaining of defendants herein alleges:

I.

That the complainant herein is now and at all the times herein mentioned was, a citizen and resident of the State of Oregon.

II.

That the complainant herein is now and at all times when the acts herein complained of were committed was, a stockholder in the defendant Payette Valley Land and Orchard Company, a corporation.

III.

That defendant O. H. Avey is now and at all the times herein mentioned was a citizen and resident of the State of Idaho, residing at Payette in said State of Idaho.

VI.

That the defendant Payette Valley Land and Orchard Company, Limited, is a corporation organized and existing under and by virtue of the laws of the State of Idaho, with its principal place of business at Payette in Payette County, (formerly a part of Canyon County), Idaho. That said corporation was organized on or about the 19th day of April, 1910. That the articles of incorporation authorize the issuance of capital stock in the amount of 2,500 shares of the par value of \$100.00 per share. That said defendant is a citizen of the State of Idaho.

V.

That said corporation was authorized by its articles of incorporation, to purchase, acquire, hold, lease, manage, control, maintain and operate and build reservoir sites, dam sites, water, water rights,

flumes, towers, and canals, buildings and machinery for supplying, selling and distributing water and electric power and to buy, sell, hold, mortgage, and lease real estate.

VI.

That Defendant O. H. Avey is now and at all times since the organization of said corporation has been, a member of the Board of Directors of and President of said defendant, Payette Valley Land and Orchard Company, a corporation.

VII.

That the plaintiff is now and for a long time prior hereto has been, the owner and record holder of 304 shares of stock in defendant corporation. That the defendant O. H. Avey is now owner and record holder of 215 shares of stock in defendant corporation and has been such owner and holder for a long time prior hereto. That one R. E. Haynes for a long time prior hereto has been and still is the owner and record holder of 60 shares of stock of said defendant corporation. That one L. V. Patch, now is and for a long time prior hereto has been the owner and record holder of 106 shares of the stock in defendant corporation. That one M. F. Albert is now and for a long time prior hereto has been the owner and record holder of 215 shares in the said defendant corporation. That one A. P. Scritchfield now is and for a long time prior hereto has been the owner and record holder of 208

shares in defendant corporation. That one C. E. Larson, now is and for a long time prior hereto has been, the owner and record holder of 104 shares of stock in said defendant corporation. That 1,428 shares of stock in said defendant corporation have been issued. That said defendant O. H. Avey and said R. E. Haynes, M. F. Albert, A. P. Scritchfield, L. V. Patch and C. E. Larson, are the duly elected and acting directors of said corporation, and together as above set forth are the record holders of 912 of said issued shares, being a majority of all shares of stock issued.

VIII.

That the by-laws of said defendant corporation provide, among other things, that it shall be the duty of the board of directors to cause to be issued to the stockholders in proportion to their several interests, certificates of stock not to exceed in the aggregate the capital stock of the company.

That on or about the 21st day of February, 1910, and in violation of said by-laws, 100 shares of stock in said defendant corporation of the par value of \$100.00 per share were issued by order of the directors of said corporation and a majority of the board of directors thereof, and without the knowledge or consent of plaintiff, to each of the following persons, to-wit: O. H. Avey, A. P. Scritchfield, M. F. Albert, J. W. Roberts, L. V. Patch, Otto C. Miller and R. E. Haynes, who at said time constituted

the board of directors of said corporation, said stock being issued as fully paid up; that the issuance of each 100 shares purported to be in consideration of a one-seventh equity in certain land consisting of about 240 acres, situate in Canyon County, Idaho; that said defendants nor either of them had any equity in said lands or any part thereof, except an option to purchase the same, which said option or interest was not of the value of said shares of stock so issued, to-wit: \$70,000 or any value at all to said corporation. That this plaintiff is reliably informed and verily believes and upon information and belief alleges the fact to be that there was no real or valuable consideration for the issuance of said 700 shares of stock in said defendant corporation, and that no part of the face or par value of said stock has ever been paid, of all of which said directors had knowledge. That between March 21, 1912, and September 21, 1915, and in violation of said by-laws above mentioned, 662 shares more of the capital stock in said defendant corporation of the par value of \$100.00 per share were issued by authority of said directors, then constituting a majority of said board, and without the knowledge or consent of plaintiff, to the persons above named in this paragraph who at said time constituted the board of directors of said corporation, as fully paid up, while in truth and in fact, and to the knowledge of said directors, said shares of stock were sold for 25 cents on each dol-

lar of the par valuation, and that there still remains unpaid upon said stock last above mentioned the sum of \$49,650.00 of which O. H. Avey owes \$8,700.00, he having purchased 116 of said shares at said price. That thereafter, there were issued to divers persons to plaintiff unknown, by authority of said directors and without the knowledge of consent of plaintiff, 28 shares of stock in said defendant corporation, of the par value of \$100.00 per share, the same being issued as fully paid up, while in truth and in fact and to the knowledge of said directors, said stock was sold at 25 cents on each dollar of valuation, and there still remains unpaid on said 28 shares, the sum of \$2,100.00. That there is due to said defendant corporation from said persons for stock issued by reason of the facts above stated, the sum of \$121,750.

IX.

That on or about the month of March, A. D. 1914, said defendant corporation through a majority vote of its directors, said directors constituting such majority, borrowed the sum of \$5,000 from the Wallace National Bank of Wallace, Idaho, and thereafter one-half of said amount was loaned by said defendant corporation to certain of its directors without the knowledge or consent of this plaintiff. That said action was in direct violation of the laws of the State of Idaho in such cases made and provided.

X.

That said defendant O. H. Avey and the other persons above named constituting the board of directors and the holders of a majority of the stock of said corporation, did on or about the..... day of December, 1917, as directors and stockholders, pass resolutions levying an assessment upon the stock held and owned by the plaintiff, amounting to the sum of \$900.00 for the alleged purpose of raising funds with which to pay debts of the corporation but upon protest of this plaintiff the said resolution was rescinded but plaintiff is informed and believes and therefore alleges that on account of the condition of the defendant company, further assessments will be made.

XI.

That there is due the defendant corporation from the defendant, O. H. Avey, for said stock, the sum of \$18,700.00, that this plaintiff has made a demand on the other stockholders of this corporation and on its board of directors to institute an action to recover said sum of defendant, O. H. Avey, but inasmuch as all the officers, directors and stockholders of the company, except this plaintiff, are in the same position as defendant, O. H. Avey, said demand made upon them to have said Payette Land and Orchard Company prosecute an action to recover said sum, was disregarded and the making of any further demand would be a vain and useless thing.

That this suit is not a collusive one to confer jurisdiction on a court of the United States of which it would not otherwise have cognizance, but is brought in good faith to protect said corporation, enforce its rights and to protect its creditors.

WHEREFORE, Plaintiff prays:

That this Court enter a decree herein giving the defendant, Payette Valley Land and Orchard Company, judgment against defendant, O. H. Avey, for \$18,700.00.

That this Court award this plaintiff his costs and give such other and further relief as may seem meet and just in the premises.

JOHN H. NORRIS,

and

HAWLEY & HAWLEY,

Solicitors for Plaintiff.

Residence: Boise, Idaho.

STATE OF OREGON,)

) ss.

County of.....)

H. C. ANDERSON, being first duly sworn deposes and says, that he is the plaintiff herein; that he has read the above complaint and knows the contents thereof and believes the facts therein stated to be true and correct.

H. C. ANDERSON,

Subscribed and sworn to before
me this 15th day of July, 1918.

H. S. McCUTCHAN,

Notary Public for Oregon,

Residence, Portland, Oregon.

My commission expires Nov. 16, 1919.

(SEAL)

2. That thereafter defendant filed with the clerk of the above entitled Court an answer in the following words omitting therefrom the title of court and cause which is identical with the title of court and cause in this bill of exceptions, to-wit:

'Come now the defendants herein and answering the complaint of the plaintiff admit, deny and allege as follows:

I.

Answering paragraph I of said complaint defendants admit that complainant is now a citizen and resident of the State of Oregon, but deny that said complainant was or has been at all the times mentioned in said complaint a citizen and resident of the State of Oregon.

II.

Answering paragraph II of said complaint, these defendants admit that complainant is now a stockholder in the defendant Payette Valley land and Orchard Company, Limited, but deny that said plaintiff was at the times and dates when the alleged acts complained of were alleged to have been committed, a stockholder or in any way interested in the Payette Valley Land and Orchard Company, Limited.

III.

Defendants admit the allegations contained in paragraph III of said complaint.

IV.

Defendants admit the allegations contained in paragraph IV of said complaint.

V.

Defendants admit the allegations contained in paragraph V of said complaint.

VI.

Defendants admit the allegations contained in paragraph VI of said complaint.

VII.

Defendants admit the allegations contained in paragraph VII of said complaint, and in addition thereto allege that since January 17, 1913, said plaintiff has been a member of the Board of Directors of said corporation, and is still a member of said Board, and at all the times and dates of the alleged acts complained of by the plaintiff in his said complaint since January 17, 1913, said plaintiff was a duly elected, qualified and acting member of the Board of Directors of said corporation.

VIII.

Defendants admit the allegations contained in the first six lines of paragraph VIII of said complaint. Further answering paragraph VIII of said complaint, defendants admit that on or about

the 21st day of February, 1910, but not in violation of any of the by-laws of said Payette Valley Land and Orchard Company, Limited, 100 shares of stock of said corporation of the par value of \$100.00 per share, were issued by order of the Board of Directors of said corporation, and without the knowledge or consent of the plaintiff, said plaintiff then not being a stockholder or interested in said corporation, to each of the following persons, to-wit: M. F. Albert, A. P. Scritchfield, O. H. Avey, J. W. Roberts, L. V. Patch, Otto C. Miller, and R. E. Haynes, who at said time constituted the Board of Directors of said corporation, said stock being issued as fully paid up. That the issuance of each of the 100 shares purported to be, and was, in consideration of a one-seventh interest in certain lands consisting of 720 acres, situated in what was at that time Canyon County, Idaho. Defendants admit and allege that the defendant Payette Valley Land and Orchard Company, Limited, had no equity or any interest in said land, or any part thereof, prior to the issuance of said stock aforesaid to the above named parties; but said defendants deny that said defendant O. H. Avey, had no equity in said land, or any part thereof, except an option to purchase the same, and deny that said A. P. Scritchfield, M. F. Albert, J. W. Roberts, L. V. Patch, Otto C. Miller and R. E. Haynes, or any or either of them, had any equity in said lands, or any part thereof, except an option to purchase

the same; and deny that the interest of the defendant O. H. Avey, in said land was not of the value of said shares of stock so issued, and deny that the interests of M. F. Albert, A. P. Scritchfield, J. W. Roberts, L. V. Patch, Otto C. Miller and R. E. Haynes, and the interest of each of said persons in said land, was not of the value of said shares of stock so issued; and deny that the stock so issued was of the value of \$70,000.00, and allege that said stock so issued had no actual or market value whatever, and that said corporation up to and until it purchased and took over the said land aforesaid and issued said stock therefor, had no property whatever, and further allege that the value of the interest of said parties aforesaid in the above described land at the time of the issuance of said stock was \$70,000.00, and was much greater than the value of the stock so issued. These defendants deny that there was no real or valuable consideration for the issuance of said 700 shares of stock of said defendant corporation, and deny that no part of the face or par value of said stock has ever been paid, and allege that said defendant, O. H. Avey, and each and all of said other parties aforesaid, paid a valuable consideration for said stock and more than the same was actually worth. These defendants admit that between March 21, 1912, and September 21, 1915, but deny that the same was in violation of any by-laws of said corporation, 662 shares more of the capital stock in said defendant

corporation of the par value of \$100.00 per share, were issued by authority of the Board of Directors of said corporation to the persons above named in said paragraph, but deny that it was without the knowledge or consent of the plaintiff, as fully paid up, for 25c on each dollar of the par valuation, and allege that said stock so issued was sold to the parties to whom the same was issued for the sum of \$25.00 per share, by order of the Board of Directors of said corporation, and deny that there still remains unpaid upon said stock last above mentioned the sum of \$49,650.00 or any other sum or amount whatever; and deny that said O. H. Avey owes on account of said sale the sum of \$8,700.00, or any sum or amount whatever. Defendants admit that said O. H. Avey purchased 116 of said shares at \$50.00 per share, and admit that 28 shares of the stock of said corporation have been sold to other parties for \$25.00 per share, by order of the Board of Directors, but deny that there still remains unpaid on said 28 shares the sum of \$2,100.00, or any sum or amount whatever, and deny that there is due the said corporation from said persons, or any or either of them, for the stock issued by reason of the facts above stated, or by reason of any other facts, the sum of \$121,750.00, or any sum or amount whatever.

IX.

Answering paragraph IX of said complaint, defendants admit said corporation borrowed the sum

of \$5,000.00 from the Wallace National Bank, of Wallace, Idaho, and that it thereafter paid said bank said borrowed money, and now owes said bank nothing. Said defendants deny that said money, or any part thereof, was loaned by said defendant corporation to certain of its directors, or to any person or persons whatsoever, but that the same was used in the business of said corporation.

X.

Answering paragraph X, these defendants allege that in December, 1917, it was the opinion of a majority of the Board of Directors of said corporation that it would be for the best interests of said corporation to pay certain indebtedness of said corporation by an assessment on the stock rather than by a sale of the property belonging to said corporation, and therefore passed resolutions levying an assessment, but afterward, but not upon protest of the plaintiff or any other person, concluded not to enforce said assessment and rescinded said resolution. These defendants allege that they have no information or belief that on account of the condition of the defendant corporation further assessments will be made, sufficient to enable them to answer the allegations that further assessments will be made, and placing their denial on that ground, deny that on account of the condition of the defendant corporation further assessments will be made.

XI.

Answering paragraph XI of said complaint, defendants deny that there is due the defendant corporation from the defendant, O. H. Avey or from any other person, for said stock, or any part thereof, the sum of \$18,700.00, or any other sum or amount whatsoever. These defendants allege that they have no information or belief as to the allegation that plaintiff has made a demand on the other stockholders of this corporation, and on its Board of Directors, to institute an action to recover the said sum of O. H. Avey, sufficient to enable them to answer such allegation, and placing their denial on that ground, deny that plaintiff has made a demand on the other stockholders of this corporation, and on its Board of Directors, to institute an action to recover said sum of O. H. Avey.

XII.

Further answering said complaint, these defendants allege that on or about the first day of March, 1910, the defendant Payette Valley Land and Orchard Company, Limited, was organized under the laws of the State of Idaho by the defendant, O. H. Avey, together with M. F. Albert, A. P. Scritchfield, J. W. Roberts, L. V. Patch, Otto C. Miller and R. E. Haynes, for the purpose, among other things, of buying orchard land, growing orchards thereon, and disposing of said land after improvement. That the articles of incorporation

authorized the issuance of capital stock in the amount of 2,500 shares of the par value of \$100.00 per share; that on said first day of March, 1910, the said incorporators aforesaid were the owners of 720 acres of land of the value of \$70,000.00, in what is now Payette County, Idaho, formerly a part of Canyon County, Idaho, suitable for orchard purposes, and the said corporation aforesaid had no other land or property with which to begin business; that said incorporators each owned an undivided one-seventh interest in said orchard land aforesaid, and agreed among themselves that each would sell his interest in said land to said corporation for 100 shares of the capital stock of said corporation as fully paid up stock; that this defendant, O. H. Avey, together with said other parties aforesaid as the Board of Directors, and being the only persons owning any stock or interest in said corporation, and the only members in said corporation, for and on behalf of said corporation issued 100 shares of said capital stock as fully paid up to this defendant, O. H. Avey, and to each of said other incorporators aforesaid, and accepted in consideration therefor, and in full payment therefor, the said land aforesaid, and soon thereafter began to and did cultivate, improve and set out an orchard thereon, and the same was thereafter the property of said corporation until the same was sold by said corporation; that at the time of the sale of said stock as aforesaid the plain-

tiff was not a stockholder and had no interest in said corporation.

XIII.

That no part of the capital stock of said defendant corporation was ever subscribed for by any person, but that all of the stock that has been issued and sold has been sold by the corporation to various persons as fully paid up stock; that none of said capital stock of said corporation has ever at any time been worth its par value, nor more than the sum of \$25.00 per share, nor has it ever at any time had a market value or been placed upon the market for sale.

XVI.

That on the 13th day of February, 1912, for the purpose of providing funds for carrying on the business of said corporation, the Board of Directors by resolution duly authorized the sale of 560 shares of stock at \$25.00 per share; that at other times and dates while plaintiff was a member of the Board of Directors and present at its meetings, said Board of Directors authorized further sales of stock for the purpose of raising funds to carry on the business, at \$25.00 per share; that of said stock so authorized to be sold as aforesaid, the Board of Directors of said corporation sold to this defendant, O. H. Avey, 116 shares of said capital stock for the sum of \$25.00 per share, at the following named dates, to-wit:

March 8, 1912.....	80 shares
October 19, 1912.....	20 shares
December 30, 1914.....	4 shares
March 4, 1915.....	4 shares
August 20, 1915	8 shares

That said stock so sold was issued to said O. H. Avey as fully paid up stock, said \$25.00 per share being the full value of said stock at said time; that this defendant O. H. Avey has paid the purchase price of said stock to said corporation for same and now owes nothing therefor; that said corporation has been obliged to sell stock of said corporation from time to time, by order of the Board of Directors, to provide funds for carrying on the business, and has never at any time been able to sell said stock for more than the sum of \$25.00 per share in cash, and has issued all stock as fully paid up for sales so made.

XV.

That on the 10th day of May, 1912, the plaintiff became the owner of 100 shares of stock in said corporation, and from said date up to the present time has at all times been familiar and fully acquainted with the business transactions of said corporation and its Board of Directors, a portion of said time having the management of its orchard tract and property; that prior to said date said plaintiff was not a member or stockholder of said corporation and was not interested therein.

XVI.

That on or about the 17th day of January, 1913, said plaintiff became one of the directors of said corporation, and at all times since said last mentioned date has been, and now is, one of the directors of said corporation and familiar with all of its business transactions, and has at all times assented to and has never at any time objected to the transactions mentioned in said complaint; that said plaintiff is guilty of laches and is now estopped from bringing this action on his alleged claims.

XVII.

That each and all of the alleged transactions complained of by plaintiff have each and all been ratified and approved by plaintiff and by said corporation.

XVIII.

That each and all of the alleged transactions complained of occurred and any action thereon accrued more than four years prior to the commencement of this action, and are barred by Section 4053, Section 4054 and Section 4060 of the Idaho Revised Code.

WHEREFORE, Defendants pray that plaintiff take nothing by this action; that said action be dismissed, and that defendants recover their costs and disbursements herein incurred.

F. H. LYONS,

And

R. E. HAYNES,

Residing at Payette, Idaho,

THOMPSON & BICKNELL,

Residing at Caldwell, Idaho,

"Solicitors for Defendants."

STATE OF IDAHO,)

) ss.

County of Payette.)

O. H. AVEY, being first duly sworn, deposes and says: That he is one of the defendants in the above entitled action; that he has read the foregoing answer and knows the contents thereof, and that he believes the facts therein stated to be true.

O. H. AVEY.

Subscribed and sworn to before me
this 12th day of August, 1918.

ROBT. E. HAYNES,

Notary Public for Idaho.

Residing at Payette.

(SEAL)

3. That thereafter, by leave of the Court, the plaintiff amended his said complaint in the following words, omitting the title of court and cause therefrom, which title of court and cause is identical with title of court and cause in this Bill of Exceptions, to-wit

“COMES NOW, the plaintiff herein and leave of the Court being first had and obtained and files an amendment to the complaint on file herein by inserting after paragraph X of said complaint and as paragraph X (a) and X (b) thereof the following:

X (a)

That the above named directors of the Payette Valley Land and Orchard Company, Limited, a corporation, have refused to make a call upon the above named defendant for the amount unpaid upon the said stock purchased by the said defendant and said directors still now refuse to make said call. That this action is brought by this plaintiff in the name of and for the benefit of the corporation to require and compel the defendant above named to pay the amount due upon his purchase of said stock. That between the 1st day of January, 1915, and the filing of this complaint the said defendant Payette Valley Land and Orchard Company, Limited, a corporation, became indebted to various parties in a large sum of money, the exact amount being unknown to this plaintiff, but upon information and belief the plaintiff alleges the fact to be that the said corporation is now, and has been for the four years last past, indebted to various creditors in the sum of \$60,000.00 in excess of its assets, and that said corporation has no funds with which to pay its creditors. That it is necessary for said corporation to collect the amounts unpaid upon the stock purchased by the said defendant herein as heretofore alleged in order for said corporation to pay its creditors. That if said corporation collects the amounts due from the defendant and other stockholders, as hereinbefore alleged, it will have sufficient

funds to pay its creditors and continue operating as a going concern and unless its said sums are collected it will become insolvent and unable to pay its creditors.

X (b)

That the plaintiff herein has agreed to pay his attorneys a reasonable fee for the prosecution of this action; that \$1000.00 is a reasonable fee for said prosecution which sum plaintiff has agreed to pay his attorneys in this suit; that by reason of his prosecution of this action plaintiff is entitled to said sum as attorney's fees.

That the prayer of said complaint be amended by adding the following paragraph:

That the Court award the plaintiff the sum of \$1000.00 as attorney's fees.

HAWLEY & HAWLEY,
Residence: Boise, Idaho.
Attorneys for Plaintiff.

STATE OF IDAHO,) ss.
County of Ada.)

H. C. ANDERSON, being first duly sworn, deposes and says that he is the plaintiff in the above entitled action; that he has read the above and foregoing amendment to said complaint and knows the contents thereof, and believes the facts therein stated to be true and correct.

H. C. ANDERSON,

Subscribed and sworn to before me this 28th day of October, 1920.

CHAS. W. MACK,
Notary Public for Idaho.
Residence: Boise, Idaho.

(SEAL)

4. That thereafter and on the 28th day of October, 1920, the said cause came on for trial before the Honorable Frank S. Dietrich, Judge of the above entitled Court, the plaintiff appearing by Messrs. Hawley & Hawley, and defendants appearing by Messrs. Richards & Haga and Thompson & Bicknell. Whereupon, the following proceedings were had, to-wit:

Upon agreement of counsel, it was ordered that this cause be consolidated for the purposes of trial with the case of H. C. Anderson, plaintiff, vs. M. F. Albert and Payette Valley Land & Orchard Company, Limited, a corporation, defendants. Thereupon, plaintiff called as a witness in their behalf C. E. Larsen, who was thereupon sworn to testify in said cause. Whereupon counsel for defendants objected to the introduction of any testimony by the plaintiff on the grounds that the complaint does not state a cause of action. Whereupon, argument was heard and the Court took said matter under advisement and having considered the same, announced his decision sustaining the objection to the introduction of evidence on the part of plaintiff to which ruling plaintiff claimed an exception which said exception was thereupon allowed. Whereupon, defendants moved the Court to dismiss said cause upon the grounds stated in said objection to the introduction of testimony which said motion the Court granted without costs to either party, to which ruling of the Court plain-

tiff duly excepted and which exception was thereupon allowed by the Court.

5. That thereafter and on the 1st day of November, 1920, a decree dismissing said cause was signed and entered in said cause in the following words, to-wit:

"This cause coming on regularly for trial before the Court this 28th day of October, 1920, Messrs. Hawley & Hawley appearing for plaintiff and Messrs. Richards & Haga and Thompson & Bicknell appearing for defendants, and the Court having permitted said plaintiff to introduce testimony under a reserved ruling on defendants' objection to the introduction of such testimony thereafter sustaining such objection and also defendants' motion to dismiss the above entitled action and the Court being fully advised in the premises, it is hereby Ordered, Adjudged and Decreed that the above entitled action be, and the same is hereby, dismissed, the parties hereto paying their respective costs.

Dated this 1st day of November, 1920.

FRANK S. DIETRICH,
District Judge."

WHEREFORE, Plaintiff prays that this his bill of exceptions, be allowed, settled and signed.

JOHN H. NORRIS,
HAWLEY & HAWLEY,
Solicitors for Plaintiff.
Residence: Boise, Idaho.

Service by copy of the foregoing bill of exceptions of plaintiff is acknowledged this 30th day of November, 1920, and it is agreed that the same is correct, complete and accurate and was in due time presented and agreed upon by the parties hereto as a full and complete bill of exceptions, and the issuance and service of citation on appeal is hereby waived.

RICHARDS & HAGA,
Residing at Boise, Idaho,
THOMPSON & BICKNELL,
Residence at Caldwell, Idaho.
Solicitors for Defendant.

The foregoing bill of exceptions is hereby settled and allowed.

FRANK S. DIETRICH,
District Judge.

STIPULATION FOR STATEMENT AND
CONTENTS OF RECORD ON APPEAL.

IT IS STIPULATED AND AGREED, by and between the respective parties in said cause, through their solicitors, that the foregoing Bill of Exceptions shall constitute a prepared statement of the case in accord with United States General Equity Court Rule Number 77, and the same may be filed in the office of the Clerk of said District Court superseding, for the purposes of the appeal in said cause all part of the record other than the

decree in said cause. It is further stipulated that the following papers and documents constitute all the portion of the records in said cause which are necessary, material or pertinent to the presentation and decision of all questions and matters arising on the appeal in said cause taken by complainant to the United States Circuit Court of Appeals, for the Ninth Circuit sitting at San Francisco, California, and that the following described parts of said record and no more, shall constitute the entire records to be transcribed, certified and included in the record to be transmitted to said Circuit Court of Appeals, on said above described appeal, to-wit:

Bill of Exceptions and Statement, including this Stipulation.

Decree.

Petition for Appeal and Order allowing Appeal.

Bond showing approval of the Judge.

Assignment of Errors.

Citation.

Praeipce to the Clerk for record, Certificate and Return.

Endorsements of service, Acceptance of service and filing, settlement or approval appearing on any of the above.

JOHN H. NORRIS,

HAWLEY & HAWLEY,

Solicitors for Complainant and Appellant.

RICHARDS & HAGA,
THOMPSON & BICKNELL,
Solicitors for Defendants and Respondents.

APPROVAL OF STATEMENT.

The preparation of the foregoing statement on appeal is hereby approved.

FRANK S. DIETRICH,
*Judge of the United States
District Court for Idaho.*

Endorsed: Filed Dec. 8, 1920.

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

DECREE OF DISMISSAL.

This cause coming on regularly for trial before the Court this 28th day of October, 1920, Messrs. Hawley & Hawley appearing for plaintiff and Messrs. Richards & Haga and Thompson & Bicknell appearing for defendants, and the Court, having permitted said plaintiff to introduce testimony under a reserved ruling on defendant's objection to the introduction of such testimony, thereafter sustaining such objection and also defendants' motion to dismiss the above entitled action, and the Court being fully advised in the premises, it is hereby ORDERED, ADJUDGED and DECREED, That the above entitled cause be, and the same is

hereby dismissed, the parties hereto paying their respective costs.

Dated this 1st day of November, 1920.

FRANK S. DIETRICH,
District Judge.

Endorsed, Filed Nov. 1, 1920.

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

PETITION FOR APPEAL.

TO THE HONORABLE FRANK S. DIETRICH,
DISTRICT JUDGE:

The above named plaintiff in the above entitled cause, to-wit: H. C. Anderson, conceiving himself aggrieved by the orders made and entered in the above entitled cause under date of October 28, 1920, and the decree made and entered by said court therein under date of November 1, 1920, wherein and whereby it was ordered that the objection of defendants to the introduction of any testimony by plaintiff be sustained and that said cause be dismissed and it was decreed that said cause be dismissed, does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from said orders and decree for the reasons set forth in Assignment of Errors which is filed herewith; and he prays that this petition for his said appeal may be allowed, and that a transcript of the records, proceedings and papers upon which

said order and decrees were made duly authenticated be sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, California, and that citation issue as provided by law.

And your petitioner further prays that the proper order setting the security to be required of him to perfect his appeal be made.

Dated this 7th day of December, 1920.

JOHN H. NORRIS,

HAWLEY & HAWLEY,

Solicitors for Plaintiff.

Residing at Boise, Idaho.

ORDER.

The foregoing petition on appeal is granted and the claim of appeal therein made is allowed.

The appellant shall give bond as required by law in the sum of \$100.00.

Done in open court this 8th day of December, 1920.

FRANK S. DIETRICH,

District Judge.

(Title of Court and Cause.)

ASSIGNMENT OF ERROR.

COMES NOW the complainant and files the fol-

lowing assignment of errors upon which he will rely upon his appeal from the decree made by this Court on the 1st day of November, 1920, in the above entitled cause:

1. That the said Court erred in sustaining defendants' objection to the introduction of any testimony on the part of plaintiff.

2. That the said Court erred in making an order dismissing said cause.

3. That the said Court erred in entering a decree dismissing said cause.

4. That the said District Court erred in not permitting the introduction of evidence on the part of the plaintiff.

5. That the said District Court erred in not hearing said cause upon the merits.

WHEREFORE, The said H. C. Anderson, appellant, prays that the decree of the District Court of the United States for the District of Idaho, Southern Division, be reversed and that the said District Court be directed to proceed with the taking of evidence in said cause and the hearing thereof upon its merits.

JOHN H. NORRIS,

HAWLEY & HAWLEY,

Solicitors for Appellant.

Residence: Boise, Idaho.

Service of the foregoing Petition for Appeal and Assignment of Error acknowledged this 7th day of December, 1920.

RICHARDS & HAGA,

THOMPSON & BICKNELL,

Solicitors for Respondent.

Endorsed, Filed Dec. 7, 1920,

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

BOND.

WHEREAS, the Plaintiff in the above entitled action is about to appeal to the United States Circuit Court of Appeals, from a judgment rendered against him in the United States District Court for the District of Idaho, Southern Division, and in favor of the Defendant, and entered upon the first day of November, 1920.

NOW, THEREFORE, in consideration of the premises, and of such appeal, the NATIONAL SURETY COMPANY, a New York Corporation, hereby undertakes and promises on the part of the appellant, that the said appellant will pay all damages and costs which may be awarded against the said Appellant on the said appeal or on a dismissal thereof, not exceeding the sum of ONE HUNDRED AND NO/100 (\$100.00) DOLLARS, to which amount it acknowledges itself bound.

IN WITNESS WHEREOF, the said NATIONAL SURETY COMPANY has caused this undertaking to be executed by its Attorney-in-Fact, at Boise, Idaho, this eighth day of December, 1920.

NATIONAL SURETY COMPANY,

By L. W. Ensign,
Its Attorney-in-Fact.

(National Surety Co. Seal.)

The foregoing Undertaking on appeal is approved this 9th day of December, 1920.

FRANK S. DIETRICH,
United States District Judge for Idaho.

Endorsed, Filed Dec. 9, 1920,
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

CITATION.

UNITED STATES OF AMERICA TO:

O. H. AVEY, and PAYETTE VALLEY LAND AND ORCHARD COMPANY, LIMITED, a corporation,

GREETINGS: You are hereby notified that in

a certain case in equity in the United States District Court in and for the District of Idaho, Southern Division, wherein H. C. Anderson is complainant and O. H. Avey and Payette Valley Land and Orchard Company, Limited, a corporation, are defendants, an appeal has been allowed the complainant therein to the United States Circuit Court of Appeals, sitting at San Francisco, California. You are hereby cited and admonished to be and appear in said Court at San Francisco, California, thirty days after the date of this citation to show cause, if any there be, why the order and decree appealed from should not be corrected and speedy justice done the parties in that behalf.

WITNESS The Honorable Frank S. Dietrich, Judge of the United States District Court for the District of Idaho, Southern Division, this the 9th day of December, A. D., 1920.

FRANK S. DIETRICH,
*United States District Judge for
the District of Idaho, Southern
Division.*

ACCEPTANCE OF SERVICE.

Service of the foregoing Citation is acknowledged and accepted this 9th day of December, 1920.

THOMPSON & BICKNELL,
RICHARDS & HAGA,

Solicitors for Defendants and Appellees.
Endorsed, Filed Dec. 9, 1920.

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

PRAECIPE TO THE CLERK FOR TRAN-
SCRIPT ON APPEAL.
TO THE CLERK OF THE ABOVE ENTITLED
COURT:

The complainant above named having on the 8th day of December, A. D. 1920, taken an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, sitting in San Francisco, California, from said certain decree made and entered in said cause in the above entitled Court on the 1st day of November, 1920, you will please prepare, certify, print, return and transmit to said Circuit Court of Appeals transcript of the record in said cause in accordance with the Act of Congress approved February 13, 1911, entitled "An Act to Diminish Expense of Proceedings on Appeal and Writ of Error or of Certiorari and rules of Court adopted thereunder, including therein the following portions of the record in said cause in accordance with the stipulation of all parties to said action and the said appeal filed herewith, to-wit:

Bill of Exceptions and statement including stipulation attached thereto.

Decree.

Petition for appeal and order allowing appeal.

Bond.

Assignment of Error.

Citation.

Copy of this Praeipe.

Certificate and Return.

Endorsements of Service, Acceptance of Service, Filing, settlement or approval appearing on any of the above.

JOHN H. NORRIS,
HAWLEY & HAWLEY,

Solicitors for Complainant and Appellant.

Service of the within and foregoing praeci-pe by receipt of copy thereof this 9th day of December, 1920, is hereby acknowledged.

RICHARDS & HAGA,
THOMPSON & BICKNELL,

Solicitors for Defendants and Respondents.

Endorsed, Filed Dec. 9, 1920.

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

CLERK'S CERTIFICATE.

I. W. D. McReynolds, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 42, inclusive, to be full, true and correct copies of Bill of Exceptions and statement including stipulation attached thereto, Decree, Petition for Appeal and order allowing appeal, Bond, Assignment of Error, Citation, Prae-ipe and Clerk's Certificate, in the above entitled cause, and that the same together constitute the

transcript upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit, as requested by the praecipe for such transcript.

I further certify that the cost of the record herein amounts to the sum of \$49.40, and that the same has been paid by the Appellant.

Witness my hand and the seal of said Court this 22th day of December, 1920.

W. D. McREYNOLDS,

(SEAL)

Clerk.

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

H. C. ANDERSON, *Appellant*,

vs.

O. H. AVEY and PAYETTE VALLEY LAND
AND ORCHARD COMPANY, Ltd., a corpo-
ration, *Appellees*.

BRIEF OF APPELLANT

*Upon Appeal from the District Court of the United
States, District of Idaho, Southern Division*

HAWLEY AND HAWLEY,

JAMES H. HAWLEY,

JESS HAWLEY,

O. W. WORTHWINE,

SAM S. GRIFFIN,

Residence: Boise, Idaho.

JOHN H. NORRIS,

Residence: Payette, Idaho,

Solicitors for Appellant.

No. 3612

IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit

H. C. ANDERSON, *Appellant*,

vs.

O. H. AVEY and PAYETTE VALLEY LAND
AND ORCHARD COMPANY, Ltd., a corpo-
ration, *Appellees*.

BRIEF OF APPELLANT

*Upon Appeal from the District Court of the United
States, District of Idaho, Southern Division*

HAWLEY AND HAWLEY,
JAMES H. HAWLEY,
JESS HAWLEY,
O. W. WORTHWINE,
SAM S. GRIFFIN,
Residence: Boise, Idaho.

JOHN H. NORRIS,
Residence: Payette, Idaho,
Solicitors for Appellant.

No. 3612

IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit

H. C. ANDERSON, *Appellant*,

vs.

O. H. AVEY and PAYETTE VALLEY LAND
AND ORCHARD COMPANY, Ltd., a corpo-
ration, *Appellees*.

BRIEF OF APPELLANT

*Upon Appeal from the District Court of the United
States, District of Idaho, Southern Division*

STATEMENT OF THE CASE

This is an appeal from a decree of dismissal, following the ruling of the court sustaining appellees' (defendants') objection to the introduction of any evidence upon the trial of the cause, upon the ground that the complaint did not state facts sufficient to constitute a cause of action against appellees' (defendants). The propriety of such ruling and the

dismissal following, rests upon the sufficiency of the allegations of the complaint with such aid as there may be in the answer, no objection to the complaint having been raised prior to calling the cause for trial upon the issues of the complaint and the appellees' answer. A synopsis of the complaint follows:

The appellant alleges that he is, and was at all times mentioned, a citizen and resident of the State of Oregon (Record, page 7) and a stockholder in appellee corporation, at this time owning 304 shares of stock (page 9); that appellee, Avey, is, and was at all times mentioned, a citizen and resident of the State of Idaho, and appellee Payette Valley Land & Orchard Company, Limited, is an Idaho corporation, organized April 19, 1910, with its principal place of business at Payette, Payette County, Idaho; that by its articles of incorporation, it was authorized to issue capital stock in the amount of 2500 shares of the par value of \$100.00 per share (page 8); to buy, sell, hold, etc., real estate; that appellee Avey, since the organization of the corporation has been a member of the Board of Directors and President of appellee corporation, and owner and record holder of 215 shares of its stock; that one R. E. Haynes is, and has been owner and record holder of 60 shares; L. V. Patch of 106 shares, M. F. Alberts of 215 shares, A. P. Scritchfield of 208 shares, and C. E. Larson of 104 shares of the stock of said corporation, and are the elected and acting corporate directors, owning 912 (a majority) of the 1428 issued shares (pages 9-10).

That the corporation's by-laws make it the duty of the Board to cause issuance to stockholders in proportion to their several interests certificates of stock not to exceed in the aggregate the capital stock.

On or about February 1, 1910, in violation of such by-laws, the directors then in office, namely: appellee Avey, and the above named Scritchfield, Patch and Haynes, together with J. W. Roberts and Otto C. Miller, without the knowledge or consent of plaintiff, caused to be issued and there were issued 100 shares of the corporation stock, par value of \$100.00 per shares, to each of said persons (page 10). The stock was issued as fully paid up and purported to be in consideration of a one-seventh equity in certain lands consisting of about 240 acres situate in Canyon County, State of Idaho, but said persons, and none of them, had any equity in such land or any part thereof except an option to purchase it, which option was not of the value of said shares of stock so issued, to-wit: \$70,000.00, or of any value at all to said corporation. Upon information and belief, the appellant further alleges that there was no real or valuable consideration for the issuance of said 700 shares of stock, and that no part of the face or par value has ever been paid, of all of which said directors had knowledge. Between March 21, 1912, and September 21, 1915, in violation of the by-law before mentioned, without the knowledge or consent of plaintiff, the same board of directors authorized the issuance of, and there were issued 662 more shares of the capital stock of appellee company of the par value of \$100.00 per share, to themselves as individuals, as fully paid up, though, in fact, sold for twenty-five dollars per share, and there remains unpaid upon said last stock the sum of \$49,650.00, of which appellee Avey owes \$8700.00, having purchased 116 of said shares. Thereafter, without the knowledge or consent of plaintiff, the same board authorized the issuance, and there were issued, to

various persons to plaintiff unknown 28 shares of stock in the corporation of the par value of \$100.00 per share, issued as fully paid up but, in fact, sold for twenty-five dollars per share, and there remains unpaid thereon the sum of \$2100.00. That there is due defendant corporation from the persons to whom said stock was issued the sum of \$121,750.00 (pages 11-12).

In March, 1914, defendant corporation, through a majority vote of its directors, borrowed \$5000.00 of the Wallace National Bank of Wallace, Idaho, and loaned one-half of such amount to certain of its directors, without the knowledge or consent of plaintiff, in direct violation of the laws of the State of Idaho (page 12).

In December, 1917, the appellee O. H. Avey and the other persons above named as constituting the board of directors and holders of a majority of the stock of said corporation, as directors and stockholders, passed resolutions levying an assessment amounting to \$900.00 on appellant's stock for the alleged purpose of raising funds with which to pay debts of the corporation, but upon protest of the plaintiff, the resolution was rescinded; plaintiff, on information and belief, alleges that on account of the condition of the appellee corporation, further assessments will be made (page 13). The above named directors and the appellee corporation have refused to make a call upon the defendant O. H. Avey for the amount unpaid upon the said stock purchased by him, and this action is brought by the appellant for the benefit of the corporation to require and compel the appellee Avey to pay the same to the corporation. Between the 1st of January, 1915, and the filing of the complaint, the appellee corporation be-

came indebted to various parties in large sums of money, the exact amount being unknown to the appellant, but he is informed and believes and alleges, therefore, that the corporation is now, and for four years last passed has been indebted to various creditors in the sum of \$60,000.00 in excess of its assets; that it has no funds with which to pay its indebtedness, and that it is necessary that the corporation collect the amounts unpaid upon the stock purchased by the appellee, as before alleged, in order to pay its creditors, and if it does so collect from said appellee and the other stockholders who secured stock under similar circumstances, the corporation will have sufficient funds with which to pay its creditors and continue operating as a going concern; and unless it does so collect, it will become insolvent and unable to pay its creditors (pages 27, 28).

It is further alleged that appellant has agreed to pay his attorneys a reasonable attorneys' fee for prosecuting the action and that \$1000.00 is a reasonable fee which should be paid to the appellant (page 28). It is then alleged that appellee O. H. Avey is indebted to appellee corporation for such stock in the sum of \$18,700.00, and appellant has made a demand on the other stockholders of the corporation and on its board of directors to institute an action to recover said sum from said O. H. Avey, but that because all the officers, directors and stockholders of the company except appellant are in the same position as appellee O. H. Avey, the demands made upon them to have appellee corporation prosecute such an action were disregarded, and the making of any further demand would be a vain and useless thing. It is further alleged that the suit is not a collusive one to confer jurisdiction on a court of the United States, but

is brought in good faith to protect such corporation, enforce its rights and protect its creditors. A decree is prayed, giving appellee corporation a judgment against appellee O. H. Avey for \$18,700.00 and awarding appellant the sum of \$1000.00 attorneys' fees and costs and for general relief (pages 13-14).

On October 28, 1920, the parties appeared for trial on the issues and appellant began the examination of his witnesses. Whereupon appellees objected to the introduction of any testimony on the ground that the complaint did not set forth facts sufficient to constitute a cause of action against appellees; the objection was sustained, a motion to dismiss followed, was granted, and the decree of dismissal made and entered on November 1, 1920; to all of which proceedings exceptions were duly taken by appellant. This is an appeal therefrom.

The case of H. C. Anderson, appellant, vs. M. F. Albert and Payette Valley Land & Orchard Company, Limited, appellees, Number 3613, was consolidated with this case for trial in the lower court, was disposed of in the same way, raises identical questions upon facts identical except that appellee Albert was not President of the corporation. The parties have stipulated that the decision in this case may be that in the latter and that but one brief and argument—that in the Avey case—need be prepared, filed, served and had. Such stipulation has been approved by this Court.

SPECIFICATION OF ERRORS.

1. The District Court erred in sustaining defendants' objection to the introduction of any testimony on the part of plaintiff.

2. That the District Court erred in making an order dismissing said cause.

3. The District Court erred in entering a decree dismissing said cause.

4. The District Court erred in not permitting the introduction of evidence on the part of the plaintiff.

5. The district Court erred in not hearing said cause upon the merits.

BRIEF OF ARGUMENT.

The errors will be discussed together inasmuch as the determination of the sufficiency of the complaint disposes of all of them.

This is an action brought by the appellant on behalf of the appellee corporation to compel a stockholder of appellee corporation to pay the balance unpaid upon the par value of the stock issued to him. The action is based primarily upon the provisions of the Idaho Statutes relative to such a liability, as well as upon the theory that the financial situation of the appellee corporation and the attempt to relieve that situation by an assessment upon appellant's stock, notwithstanding the fact that the individual appellee, O. H. Avey, has not yet paid the full par value of his stock, makes applicable the theory that the capital stock of a corporation is a trust fund which, appellant urges, not only is it the right, but the duty of the corporation as trustee of that fund, to collect. The ruling of the trial court upon the motion objecting to the introduction of any evidence for the reason that the complaint does not state facts sufficient to constitute a cause of action necessarily was based wholly upon a consideration of the allegations of the complaint which, for the purposes of the motion, must be deemed to be true. A synopsis of the complaint has been set forth in the statement of this brief and the complaint in full with its allowed

amendments will be found in the transcript of record, pages 7-14, and 27-28.

Appellant will first discuss the statutory theory of the right of recovery, and that the court may have the provisions of the statute before it, the following quotations and the pertinent portions thereof are set forth:

Section 9 of Article 11 of the Constitution of Idaho, relating to corporations, provides:

“No corporation shall issue stocks or bonds except for labor done, services performed, or money or property actually received; and all fictitious increase of stock or indebtedness shall be void. * * *”

And Section 17 of the same Article provides:

“Dues from private corporations shall be secured by such means as may be prescribed by law, but in no case shall any stockholder be individually liable in any amount over or above the amount of stock owned by him.”

Section 4715 of the Idaho Compiled Statutes of 1919 (and this, as were all other sections hereinafter quoted, was in effect at all the times mentioned in the complaint) provides:

“The directors of corporations must not make dividends except from the surplus profits arising from the business thereof; nor must they divide, withdraw or pay to the stockholders, or any of them, any part of the capital stock; nor must they reduce or increase the capital stock except as in this statute specially provided. For a violation of the provisions of this section the directors under whose administration the same may have occurred, except those who may have

caused their dissent therefrom to be entered in the minutes of the meeting of the board of directors at the time, or those who were not present when the vote was taken, are in their individual and private capacity, jointly and severally liable to the corporation and to the creditors thereof, in the event of dissolution, to the full amount of the capital stock so divided, withdrawn, paid out or reduced * * *."

Section 4728:

"Each stockholder of a corporation is individually and personally liable for its debts and liabilities to the full amount unpaid upon the par or face value of the stock or shares owned by him.

"Any creditor of the corporation may institute actions against any of its stockholders jointly or severally, and in such action the court must determine the amount unpaid upon the stock held or owned by each defendant, and a several judgment must be entered against him for a sum not exceeding such amount.

"Nothing in this title must be construed to render any stockholder individually or personally liable, as such stockholder, for debts or liabilities of the corporation, either at the suit of a creditor or for assessments or calls, to an amount exceeding the balance unpaid upon his stock or the difference between the amount that has been actually paid upon his stock and the par or face value thereof, except when so liable on the ground of fraud or misrepresentation, or concealment, or for neglect or misconduct as an officer, agent, stockholder or member of the corporation.

"No corporation shall issue any stock as paid up, in whole or in part, or credit any amount, assessment or call as paid upon any of its stock, except for money, property, labor or services actually received by the corporation, or actually paid upon the indebtedness of the corporation, as provided in this section, to the full value of the amount credited upon such stock.

"If any stockholder of any insolvent corporation pays the full amount unpaid upon the stock held by him as above defined, upon the overdue debts of the corporation, incurred while he was such stockholder, he is relieved from any further personal liability upon his stock, but not from any liability for fraud, neglect or misconduct. The liability of such stockholder is determined by the amount of stock or shares owned by him at the time the debt or liability was incurred by the corporation, and such liability is not released or discharged by any subsequent transfer of stock.

"When such liability does not arise upon contract, it shall be deemed to be incurred when judgment thereof is obtained against the corporation * * *."

Section 4729:

"All corporations for profit must issue certificates for stock when fully paid up, signed by the president and secretary, or such other officers as may be authorized by the by-laws of the corporation, and all such corporations may provide in their by-laws for issuing certificates prior to the full payment, under such restrictions and for such purposes as their by-laws may provide."

Section 4733:

“The directors of any corporation formed or existing under the laws of this state, after one-fourth of its capital stock has been subscribed, may, for the purpose of paying expenses, conducting business or paying debts, levy and collect assessments upon the subscribed capital stock thereof, in the manner and form, and to the extent, herein provided.”

Section 4734:

“No one assessment must exceed 10 per cent of the amount of the capital stock named in the articles of incorporation except in the cases in this section otherwise provided as follows:

“1. If the whole capital of a corporation has not been paid up, and the corporation is unable to meet its liabilities or to satisfy the claims of its creditors, the assessment may be for the full amount unpaid upon the capital stock; or if a less amount is sufficient, then it may be for such a percentage as will raise that amount. * * *”

Section 4751:

“On the day specified for declaring the stock delinquent, or at any time subsequent thereto, and before the sale, the board of directors may elect to waive further proceedings by sale, and may elect to proceed by action to recover the amount of the assessment and the costs and expenses already incurred, or any part or portion thereof.”

For the ascertainment of whether or not the complaint states facts sufficient to bring the case within the statutory provisions just quoted, it is necessary

to determine whether or not the complaint shows that there is, in fact, a balance of unpaid par value remaining and, secondly, whether the appellant on behalf of the corporation can require the payment thereof to the corporation.

(A) UNDER THE IDAHO STATUTES APPELLEE AVEY OWED TO THE CORPORATION IN THE NATURE OF AN EXPRESS SUBSCRIPTION THE AMOUNT OF THE PAR VALUE UNPAID UPON THE STOCK ISSUED TO HIM.

That the appellee, O. H. Avey, did not, in fact, pay the par value of the stock for which he subscribed and which was issued to him clearly appears from the complaint. As to 100 of the shares so received, it appears (Complaint, paragraph 8, record pages 10-11) that Avey transferred to the corporation for such shares what was claimed to be a one-seventh equity in certain land, but it further appears that in fact he had no such equity in such land or any part thereof except a mere option to purchase the same, which option was without any value to the corporation at all, and particularly not of the value of the shares issued; and not only did Avey have knowledge of this as an individual but also as the President and a director of the corporation. If in truth such purported equity had no value as is alleged in the complaint, then it is clear that Avey has paid nothing on said one hundred shares of stock and if he is liable for anything by reason thereof, he is liable for the entire par value of said shares. It further appears from the complaint as to 116 shares purchased by Avey (Complaint, paragraph 8; Record, pages 11-12) that only twenty-five dollars was paid per share although the par value was \$100.00, and as to these shares it is clear that if Avey is respon-

sible for any payment thereon, in addition to what he has already paid, he is responsible for \$75.00 per share as alleged in the complaint.

But it further appears in portions of the complaint above cited that in each case the stock was issued as fully paid, and it, therefore, becomes necessary to ascertain whether or not issuing said stock as fully paid makes it such, so far as the liability of Avey is concerned, notwithstanding the fact that nothing, or only a portion of the par value, was actually paid. We are not here concerned with what might be the rule in the absence of any statute because the statutes of the State of Idaho contain particular provisions relating to this very matter, and it is the construction of such statutes that will govern.

It will be observed that the complaint alleges that appellee O. H. Avey is now and at all times since the organization of the corporation has been a member of the board of directors and the president of the appellee corporation, and that in his transactions with the corporation he was not only acting on the one side of the transaction as an individual, but was acting on the other side of the transaction as one of the directors of and the President of the corporation with which he dealt in acquiring his stock, and it is also notable that the other directors of the corporation were engaged in exactly similar transactions (Complaint, paragraphs 6, 7, 8; Record, pages 9-12). This not only required of Avey the utmost good faith in this transaction, but gave to him a knowledge, not only presumed, but actual, of the conditions under which the corporation could contract for the sale of its stock. In other words, he not only had presumed, but had actual knowledge of the provisions of the statute hereinbefore quoted, and such

provisions became an essential and non-waivable condition of his purchase and acceptance thereof. Specifically, then, he knew that any term of a contract which he might make for the purchase of stock without payment of par value would be invalid and would have the practical effect of dividing, withdrawing and paying to a stockholder (himself) part of the capital stock and of reducing the capital stock other than as specifically provided in the statute (Section 4715, Compiled Statutes, 1919, *supra*). He further knew, and to this we draw the court's particular attention because it is the very meat of this proposition, that

"No corporation shall issue any stock as fully paid up in whole or in part or credit any amount, assessment or call paid upon any of its stock, except for money, property, labor or services actually received by the corporation, or actually paid upon the indebtedness of the said corporation as provided in this section, to the full value of the amount credited upon such stock."

Section 4728, Idaho Compiled Statutes, 1919;
Sections 9 and 17, Article 11, Constitution
of Idaho, *supra*.

The taking of stock by Avey constituted a subscription therefor.

Volume 1, Thompson on Corporations, 2d Ed.,
Section 557, page 668; Section 573, page
689; Section 583.

And it became a binding subscription for the full par value of the stock relieved from the status of paid up stock since such status was contrary to the power of the corporation and the statutory provi-

sions, as Avey, both as an individual and as director and officer of the corporation, well knew.

Putnam v. New Albany & Sandusky etc. Co.,
83 U. S. 390, 21 L. ed. 361.

14 Corpus Juris, "Corporations," Sec. 849, p.
569.

Quartz Glass etc. Co. v. Joyce, 150 Pac. 648
(Cal.).

"It is clear that a corporation has no power to accept a subscription upon stipulations or conditions that are contrary to its charter or that are prohibited by statute; that is, a corporation is not authorized to agree to perform any condition or stipulation which is prohibited by the charter or by statutory law, or which is contrary to public policy, or a fraud upon either the corporation itself or the other subscribers. Where such stipulations are made and the subscriptions received, the general rule is that the subscription is binding on the subscriber, and that the stipulations can neither be set up as a defense to an action upon the subscription, nor can they be made the foundation of an action against the corporation. Mr. Halliwell has stated the rule as follows: 'It must be distinctly observed, however, that a corporation not only may not bind itself to violate law or act in contravention of public policy, but that the distinct limitations upon its powers as an artificial being which it may not exceed directly it may not bind itself to exceed. The powers of a corporation defined by law or by its articles of incorporation are matters of public notice. Where, therefore, a party has attached to his subscription a condition subsequent, the performance of

which would involve the corporation in a course of procedure in violation of law or public policy, or in excess of its charter powers, the condition may be disregarded, and the subscription deemed absolute.' This principle is applied in cases where the charter of the corporation or the general laws require the payment of the capital stock in full, and subscription is to be paid, or that the money when paid, is to be returned immediately to the subscriber."

1 Thompson on Corporations, 2d Ed., Sec. 629, page 761.

In *Jensen vs. Aikman*, 32 Idaho 261, 181 Pac. 525, a creditor brought an action against a stockholder to recover the unpaid par value of stock owned. The Idaho Supreme Court, in considering the complaint in that case, stated:

"While an agreement that the stock was not to be paid for, if such agreement was made, may be void, the subscription is valid, and the stockholder's liability is binding."

Meholin vs. Carlson, 17 Idaho, 742; 107 Pac. 755.

Feehan vs. Kendrick, 32 Idaho 220; 179 Pac. 507.

With this view of the case it needs no argument to reach the one conclusion that the corporation is entitled to recover on this subscription.

(B) AVEY'S ACCEPTANCE OF STOCK RAISED AN IMPLIED PROMISE TO PAY THE PAR VALUE THEREOF.

And the same result is reached by ignoring the express subscription and its enforcement and con-

sidering only the terms of the statute. It is appellant's contention that the whole course of legislation hereinbefore quoted indicates unequivocally the legislative intent that the par value of shares of stock shall be paid either in money or money's worth and while the certificates of stock may be issued prior to full payment yet full payment must be secured in some way and certainly cannot be waived. This provision is as much for the benefit of other share holders as it is for creditors or the corporation itself and when the matter is viewed from that standpoint it must follow that the acceptance of the shares raises an implied or quasi contract to pay for them to the statutory extent. That implied contract is for the benefit of the corporation, its creditors and share holders, and the corporation must be entitled to enforce that obligation. In fact, the statute specifically recognizes that power and right by providing that the directors after one-fourth of the capital stock has been subscribed may "for the purpose of *paying expenses, conducting business, or paying debts, levy and collect assessments upon the subscribed capital stock thereof in the manner and form and to the extent herein provided.*" (Section 4733, Idaho Compiled Statutes, 1919.)

The Idaho Supreme Court in *Wall vs. Basin Mining Company*, 17 Idaho 317; 100 Pac. 753; 22 L. R. A. (N. S.) 1013, held that the word "assessment" as used in this section referred as well to "calls" for unpaid subscription.

Such a liability on the part of the stockholder is an asset of the corporation which it may collect, not only for the purpose of paying debts but as said in the statute just above quoted, for the purpose of conducting its business.

Pettus vs. Lynde, 106 U. S. 519; 27 L. Ed. 265.

Powell vs. Oregonian R. R. Co., 3 L. R. A. 201.

Du Pont vs. Ball, 106 Atl. 39 (Del.)

Rosoff vs. Gilbert Transportation Co., 221 Fed. 972-986.

Mathers vs. Western Carolina Bank, 47 S. E. 893 (N. Carolina).

In connection with the statute above quoted giving the right to the corporation to collect the unpaid par value of the stock it should not be overlooked that Section 4715, Idaho Compiled Statutes, 1919, hereinbefore quoted, prohibits the dividing, withdrawing or paying to the stockholders or any of them any part of the capital stock or reducing the capital stock except as specifically provided by the statute. If this is done the directors under whose administration the same has occurred are individually and severally liable *to the corporation*. Certainly the issuance of stock to the directors themselves at a value much less than par and in the face of the statutory prohibition is in effect, and results in exactly the same way as, a withdrawal, division, or payment of capital stock to such persons, and while it does not on its face reduce the capital stock it does in fact do that very thing. The appellant urges that reading the various sections of the statute together makes it clear that it was the legislative intent for the corporation itself to collect the unpaid par value and particularly it was the intention that it should have such power whenever the contingency of paying the expenses, conducting its business or paying its debts arose; such a

contingency is set out in the complaint because it is alleged that for several years the corporation has been practically insolvent (Record, pp. 27, 28). That is to say, its indebtedness has exceeded its assets by some \$60,000.00 and it is necessary in order to pay such creditors and continue operations as a going concern that the unpaid par value be collected. And this, Avey as one of the directors recognized in that for the purpose of raising funds to pay debts he with others of the directors and holders of the majority of the stock of the corporation attempted to levy an assessment on appellant's stock and will attempt to assess such stock further on account of the condition of the company. (Record, page 13.)

It should not be overlooked in determining the legislative intent to permit the corporation itself to collect the unpaid par value that the third subdivision of Section 4728, Idaho Compiled Statutes, 1919, provides:

“Nothing in this title must be construed to render any stockholder individually or personally liable as such stockholders for debts or liabilities of the corporation *either in the suit of a creditor or for assessments or calls to an amount exceeding the balance unpaid upon his stock or the difference between the amount that has been actually paid upon his stock and the par or face value thereof.*”

And also that subdivision 1 of Section 4734 provides that:

“If the whole capital of the corporation has not been paid up and the corporation is unable to meet its liabilities or satisfy the claims of its creditors the assessment may be for the full amount unpaid upon the capital stock. * * *”

In *Whitewater Tile and Pressed Brick Manufacturing Company vs. Baker*, 125 N. W. 984, it appeared that the treasurer of the company had received a bonus of six shares for which he had paid nothing. The Wisconsin statute required that the full par value of stock be paid and the corporation sued for the par value of the six shares; it was held that the corporation might treat the stock as valid and recover its par value.

The same transaction, except that it involved a different defendant, was before the court in *Whitewater Tile & Pressed Brick Manufacturing Co. v. Johnson*. The opinion of the Wisconsin Supreme Court is reported at 175 N. W. 786, in which the court says:

“The issue of stock at less than its par value or with an understanding that part of it is not to be paid for is contrary to the provisions of Section 1753, statutes 1898, and when such fact appears then the issue is fraudulent in law irrespective of the intent.” (After finding that there was no conspiracy between the stockholders, the court continued):

“That being so, only an individual and not a joint liability resulted.

Under the facts found and under the rule laid down in *Whitewater Tile & Pressed Brick Co. v. Baker*, 142 Wis. 420, 125 N. W. 984 (*supra*) the court should have entered judgment against the defendant for the difference between the par value of the stock issued to him and what he paid therefor.”

(C) THE CAPITAL OF A CORPORATION IS A TRUST FUND FOR CREDITORS AND STOCKHOLDERS AND IF SOME STOCKHOLDERS HAVE NOT PAID PAR VALUE FOR THE STOCK, THE CORPORATION AS TRUSTEE MAY COLLECT THE UNPAID PART, PARTICULARLY WHEN THE CORPORATION REQUIRES SUCH FUND TO CONTINUE BUSINESS, PAY CREDITORS AND PREVENT AN ASSESSMENT AGAINST THE STOCK OF AN INNOCENT STOCKHOLDER.

We turn now to the other proposition on which this action may be sustained; That is the theory which has been denominated the trust fund theory. It needs neither argument nor citation of authorities for the general proposition that the capital stock of a corporation is a trust fund for the creditors of that corporation. Such a proposition is recognized by the statutes of the State of Idaho hereinbefore quoted and is a well known American doctrine even in the absence of similar statutes.

Feehan vs. Kendrick, 32 Idaho 221; 179 Pac. 507.

Barnard v. Carr, 83 S. E. 817, and cases therein cited.

Eastern National Bank vs. American Brick & Tile Co., 6 Atl. 54, 57.

14 C. J. "Corporations," pages 950 to 962, incl.

Nor are we concerned with any steps which the creditor himself might take to enforce this liability in his favor. It is appellant's contention, however, that it is not only the right but the duty of this corporation to take all steps necessary to collect its assets, in this case the unpaid par value of the stock

issued as alleged in the complaint—not only because the statutes of the State of Idaho make it such duty and give it such right but because of the peculiar equitable situation which presents itself in favor of the appellant, a stockholder in the appellee corporation.

There has already been discussed the proposition as to the necessity for payment in full of the stock issued by an Idaho corporation and the proposition that in this case the appellee Avey does under the statutes and in fact owe a balance on his stock.

Appellant contends that the corporation as the trustee of this fund can under the contingencies which are shown to exist in this case—namely the practical insolvency of the company—collect this fund, and that he as a stockholder who is about to be assessed for the payment of these debts can require that it so collect because under the circumstances that fund is not only a trust for the creditors but a trust for him and if the corporation does not enforce it it will result in his injury.

As has been said, the corporation in this case is heavily indebted and has been for a considerable time, owing some \$60,000.00 above its assets. This in itself creates a duty upon the part of the corporation to collect the unpaid par value of its capital stock.

“The creditors have the right to have such funds collected and applied to the discharge of their debt. If the capital stock has not been paid for by those to whom the certificate has been issued *it is the plain duty of the directors or of the court to require it to be collected*, or so much thereof as may be necessary to discharge the unpaid debts.”

Barnard v. Carr, 83 S. E. 816.

"In common law a stockholder was to the extent of the amount unpaid on his stock liable for the corporate indebtedness, (7 R. C. L. 356) *either through the corporation* represented by an assignee or a receiver or by the creditors individually."

Feehan vs. Kendrick, 32 Idaho 220-223.

The statutes of Idaho heretofore quoted specifically recognize the duty and the power of the corporation under such contingencies to collect such unpaid par value. This is specially provided by Section 4733:

"The directors of any corporation formed or existing under the laws of this state after one-fourth of its capital stock has been subscribed may *for the purpose of paying expenses, conducting business or paying debts* levy and collect assessments upon the subscribed capital stock thereof in the manner and form and to the extent herein provided."

And as hereinbefore pointed out the Supreme Court of Idaho has held that this is applicable to collection of calls upon the unpaid portion of the par value of stock issued. The foregoing section is followed by Section 4734, which provides:

"No one assessment must exceed ten per cent of the amount of the capital stock named in the articles of incorporation *except in the cases in this section otherwise provided as follows*:

1. If the whole capital of a corporation has not been paid up and the corporation is unable to meet its liabilities or to satisfy the claims of its creditors the assessment may be for the full amount unpaid upon the capital stock. * * *"

And it is provided by Section 4751 that the board of directors may elect to proceed by action to recover the amount of the assessment.

Wall vs. Basin Mining Co., 16 Idaho 313, 101 Pac. 733; 22 L. R. A. (N. S.) 1013.

But the appellant further contends that the instant case presents a situation which makes it a duty of the corporation to bring its action and collect the unpaid amount because otherwise an intolerable burden would be placed upon him. It appears as has hereinbefore been pointed out, that an assessment upon appellant's stock was levied by this very board of directors which issued to itself stock at less than par though denominated fully paid stock. This same board of directors, in order to pay an indebtedness which the creditors of the corporation could directly enforce against them, have attempted and will probably attempt in the future to raise the money necessary to pay off the creditors and to continue the business of the corporation, not out of the capital stock which the statutes intended should constitute the funds for that purpose, but as an additional contribution from this appellant. Equity certainly will never permit such a situation to continue nor such an unjust contribution be forced from appellant. The situation disclosed by the complaint requires the most rigid application of the principle that the board of directors must act in good faith and requires that no matter what the rules may be in general as to the power of the creditors themselves or of corporations on their behalf to recover unpaid portions of the par value of the stock issued, the situation in this case requires that equity permit this stockholder on behalf of this corporation to enforce such liability against the stockholder who would otherwise gain

such an unjust and unconscionable advantage; that in the situation here disclosed the corporation must be required to act as a trustee for the stockholder and collect the trust fund—its capital.

(D) THE LEGISLATURE OF IDAHO INTENDED TO REQUIRE FULL PAYMENT FOR ALL CORPORATE STOCK FOR THE PROTECTION OF INVESTORS.

And there is another reason why this decision of the trial court should be reversed in this case. A corporation of the State of Idaho exists by virtue of the authority conferred upon it by the Constitution and Statutes of the State. The powers and authority of a corporation created under the law of the State of Idaho are therefore determined by the provisions of the Constitution and the enactments of the State Legislature in force and effect at the time of the creation of said corporation. At the time the Payette Valley Land & Orchard Company, Ltd., was created there was in force and effect in the State of Idaho a provision of the statute which said, "No corporation shall issue any stock as paid up in whole or in part, etc." (Sec. 4728 *supra*.) The purpose of this enactment was unquestionably to insure to every person who came into any business relation with the corporation that the amount of its capital stock was equivalent to the amount of its actual capital fund as shown by its books. Had the legislature merely intended to create a creditor's liability it would not have enacted the fourth paragraph of Section 4728, Idaho Compiled Statutes. Stockholder's liability was established by the first paragraph of said section, and the fourth paragraph of said section relating to the issuance of stock as paid up was to insure that whenever the corporation issued

stock as paid up in full and thus asserted receipt of full value for it, it have its equivalent in money or money value.

The complainant in this case alleges that he is the owner of a large part of the issued and outstanding stock of the corporation and that the issuance of stock to the appellee, Avey, under the circumstances as stated in the complaint was without his knowledge and consent.

We contend that one of the purposes of the enactment of the fourth paragraph of Section 4728 was to protect not only creditors but the persons who invested money in the corporation as stockholders. We urge that it was the intention of the Legislature in enacting the statute above referred to to enable the stockholder who has invested his money in the capital stock of a corporation to institute and maintain a suit to collect the unpaid balance due on stock which has been issued as fully paid up and it was the intention of the Legislature to give this right in order to protect those who might become purchasers of the stock of a corporation and who, under the statute, have the right to rely upon the showing of the books of the corporation as to the amount of its invested capital. As we view this matter, unless this was the intention of the Legislature, the provision of the statute referred to is meaningless and without effect. In this connection it must be borne in mind that a business corporation is organized for the purpose not only of carrying on business itself but to enable a large number of investors to pool their capital. Large numbers of corporations are organized for the purpose of inducing individuals to contribute such capital as they may have to the common enterprise and the Legislature having knowledge of

this fact enacted the provision of the statute relating to the issuance of stock which is not paid up in full. It was with the intention of placing all the investors in an equal position that this provision was enacted and it follows therefore that when a person has invested in the capital stock of a corporation without knowledge of the fact that other persons have secured stock as fully paid up when in fact it was not fully paid up such an individual may, in the event the corporation refuses to do so, maintain an action for recovery of that amount to the corporation.

For the foregoing reasons the appellant contends that the trial court erred in refusing to permit the introduction of evidence and in dismissing the cause; that the complaint as filed does state facts sufficient to constitute a cause of action against the appellees and the cause should be remanded to the trial court with instructions to proceed with the hearing and to determine the cause upon its merits.

Respectfully submitted,

HAWLEY & HAWLEY,

By JAMES H. HAWLEY,

JESS B. HAWLEY,

O. W. WORTHWINE,

SAM S. GRIFFIN,

JOHN H. NORRIS,

Solicitors for Appellant.

IN THE
12
United States
Circuit Court of Appeals
For the Ninth Circuit

H. C. ANDERSON,

Appellant,

VS.

O. H. AVEY and PAYETTE VALLEY LAND &
ORCHARD COMPANY, LIMITED, a Corpora-
tion, *Appellees.*

BRIEF OF APPELLEE O. H. AVEY

*Upon Appeal from the United States District Court
for the District of Idaho, Southern Division*

RICHARDS & HAGA,
Residence, Boise, Idaho,
Solicitors for Appellee O. H. Avey.

FILED

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A. D. MONKTON
CLERK

No. 3612

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tion,

Appellees.

BRIEF OF APPELLEE O. H. AVEY

*Upon Appeal from the United States District Court
for the District of Idaho, Southern Division*

RICHARDS & HAGA,

Residence, Boise, Idaho,

Solicitors for Appellee O. H. Avey.

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

H. C. ANDERSON,

Appellant,

VS.

O. H. AVEY and PAYETTE VALLEY LAND &
ORCHARD COMPANY, LIMITED, a Corpora-
tion,

Appellees.

BRIEF OF APPELLEE O. H. AVEY

STATEMENT

This is an equity action brought by appellant, a stockholder of appellee, Payette Valley Land and Orchard Company, Limited, a corporation, on behalf of and for the benefit of such corporation, against appellee, O. H. Avey, who is also a stockholder of the corporation, to recover the sum of eighteen thousand seven hundred (\$18,700) dollars, being the aggregate of ten thousand (\$10,000) dollars representing the par value of one hundred shares of stock alleged (Transcript, pp. 10 and 11) to have

been issued to appellee in payment for property received by the corporation; and eight thousand seven hundred (\$8,700) dollars, being seventy-five (\$75) dollars per share for 116 shares of stock alleged (Tr., pp. 11 and 12) to have been issued and sold to appellee Avey for twenty-five (\$25) dollars per share when the par value was one hundred (\$100) dollars per share.

The allegations of the complaint are set forth at some length in appellant's brief and with substantial correctness. It is alleged that the corporation was organized on or about April 19, 1910 (Tr., p. 8); that 1,428 shares of stock in the corporation of the par value of one hundred (\$100) dollars per share have been issued (Tr., p. 10), of which appellant "now and for a long time past has been the owner and record holder of 304 shares" (Tr., p. 9). It is further alleged that 700 of the 1,428 shares were issued on or about February 21, 1910, to appellee and certain other persons constituting the board of directors of the corporation as fully paid up in return for an option on certain real estate "which was not of the value of said shares of stock so issued, to-wit: \$70,000, or any value at all to said corporation" (Tr., p. 11), and that such action was taken by order of the board of directors and without the knowledge or consent of plaintiff. It is further alleged in the same paragraph that between March 21st, 1912, and September 21st, 1915, 662 shares of the stock were issued by authority of the board of directors and without the knowledge or consent of plaintiff to the

members of such board as fully paid up shares, when only twenty-five cents on each dollar of the par valuation had been paid, and that subsequently 28 shares were issued for a similar consideration. This leaves only 38 shares of stock of the corporation unaccounted for, and necessarily, therefore, a large part of the 304 shares of stock owned by appellant must be either a part of the 700 shares issued for property or a part of the stock issued at twenty-five (\$25) per share or both. If any portion of this 38 shares was paid for in full in money or property and appellant holds even one share of such stock, it was incumbent upon him to allege such facts and show that part at least of the stock owned by him and upon which he bases his right of action was issued for its full par value in money or property. As a matter of fact, it appeared from the testimony of appellant himself, introduced subject to a reserved ruling (Tr., p. 30) that all his stock was issued in one or the other of the transactions complained of and apparently the allegation of paragraph 2 to the effect that plaintiff "now and at all times when the acts herein complained of were committed was a stockholder in the defendant, Payette Valley Land and Orchard Company, a corporation" is merely colorable in an attempt to comply with general equity Rule 27.

The complaint further alleges that appellee Avey holds 100 shares of the stock issued for property and 116 shares of the stock sold at twenty-five (\$25) dollars per share, and hence, he and appellant are in exactly the same position upon the question of

their stock being fully paid for, and yet the bill contains no offer on the part of complainant to do equity as regards the balance that would be unpaid upon his own stock if there is a balance due on that of appellee. Nor does he allege that a single share of his own stock was issued for full value in money or property.

The case is here on appeal from a judgment of dismissal, the learned Trial Court having sustained appellees' objection to the evidence on the ground that the bill did not state facts sufficient to constitute a cause of action. The questions presented for determination are, therefore, whether upon the allegations of the bill appellant can recover from appellee Avey for the benefit of the corporation, first, for the par value of the 100 shares issued for property received by the company and valued by its board of directors at the par value of the stock, and second, for the difference between the par value of the 116 shares sold to appellee Avey and the amount actually paid for them by the latter, which difference is alleged to have been seventy-five dollars per share or eight thousand seven hundred dollars.

The allegations of Paragraphs IX and X of the Bill (Tr., pp. 12 and 13) may be disregarded, we think, for the reason that it appears that the loan referred to in Paragraph IX was repaid and the proposed assessment alleged in Paragraph X was canceled. Neither allegation shows any injury to appellant or to the corporation, and no relief is sought upon either allegation, and neither of these

alleged transactions are connected in any way with the transactions which are the basis of the complaint.

BRIEF OF THE ARGUMENT

A cause of action comprises every fact necessary to the relief prayed for.

McAndrews vs. Chicago etc. Co., 162 Fed. 856, 89 C. C. A. 546.

Mercantile T. & D. Co. vs. Roanoke etc. Co., 109 Fed. 3.

Matz vs. Chicago etc. Co., 85 Fed. 180.

Billing vs. Gilmer, 60 Fed. 332, 8 C. C. A. 645.

The statutes of Idaho authorize a corporation to issue stock as full paid for property, and when a corporation makes such issue, the judgment of the directors of the corporation as to the value of such property, in the absence of fraud, is made conclusive.

Sec. 4728, Compiled Statutes of Idaho.

Sec. 4752, Compiled Statutes of Idaho.

Old Dominion Copper etc. Co. vs. Lewisohn, 210 U. S. 206, 52 L. Ed. 1025.

Walburn vs. Chenault, 23 Pac. 657, 43 Kan. 352.

Eggleson vs. Pantages, 160 Pac. 425, 428, 93 Wash. 220.

Foster vs. Seymour, 23 Fed. 65.

Where a corporation issues fully paid stock in return for property conveyed, neither the corpora-

tion nor its shareholders have a right of action against the shareholders receiving such stock in the absence of actual fraud.

Sec. 4728, Idaho Compiled Statutes.

Cunningham vs. Holley etc. Co., 58 C. C. A.
140, 121 Fed. 720.

Coit, Admr., vs. North Carolina Co., 119
U. S. 343, 30 L. Ed. 420.

Walburn vs. Chenault, *supra*.

Krisch vs. Interstate Fisheries Co., 81 Pac.
(Wash.) 855.

Eggleston vs. Pantages, *supra*.

Inland Nursery etc. Co. vs. Rice, 57 Wash.
67, 106 Pac. 499.

Clinton M. & M. Co. vs. Jamison, 256 Fed.
577.

Northern Trust Co. vs. Columbia etc. Co., 75
Fed. 936.

Foster vs. Seymour, 23 Fed. 65.

14 Corpus Juris, pp. 458-459.

O'Dea vs. Hollywood Cemetery Co., 145 Cal.
53, 97 Pac. 1.

Even the right of creditors to attack such action seems to be based upon fraud.

Sec. 4728, Idaho Compiled Statutes.

Cunningham vs. Holly etc. Co., *supra*.

Where a corporation issues stock at less than par, creditors who have reduced their claims to judgment and exhausted their legal remedies against the corporation may maintain an action to compel the

holders of such stock to pay the difference between its cost and par, but this remedy is not available to the corporation.

Sec. 4728, Idaho Compiled Statutes.

Feehan vs. Kendrick, 32 Ida. 220, 179 Pac. 507.

5 Fletcher Cyclopedia Corporations, p. 5899.
Scoville vs. Thayer, 105 U. S. 143, 26 L. Ed. 968.

Dickerman vs. Northern Trust Co., 176 U. S. 181, 44 L. Ed. 823.

There is no Idaho statute prohibiting a corporation from issuing its shares at less than par, and the appellee corporation having consented to the alleged issue at less than par, has no right of action by reason thereof.

Courtney vs. Georger, 221 Fed. 502.

Courtney vs. Georger, 228 Fed. 859, 143 C. C. A. 257.

In re Huffman—Salvor Roofing Paint Co., 234 Fed. 798.

Kimbell vs. Chicago etc. Co., 119 Fed. 102, 106, 55 C. C. A. 162.

Writ of certiorari denied, 189 U. S. 512, 47 L. Ed. 924.

Dickerman vs. Northern Trust Co., 176 U. S. 181, 44 L. Ed. 423, 429.

O'Dea vs. Hollywood Cemetery Ass'n, 97 Pac. (Cal.) 1, 6.

In re Jassoy Co., 101 C. C. A. 641, 178 Fed. 515.

Smith vs. Martin, 135 Cal. 247, 67 Pac. 779.
California Trona Co. vs. Wilkerson, 20 Cal.
App. 694, 130 Pac. 190.

An Idaho corporation can only collect calls on assessments in accordance with the statutes and cannot waive its right to proceed against the stock and sue the stockholder personally until the assessment has gone delinquent.

Secs. 4733-4738, Idaho Compiled Statutes.

Sec. 4751, Idaho Compiled Statutes.

Wall vs. Basin Mining Co., 16 Ida. 313, 101
Pac. 733.

It could not sue part of the stockholders or assess them only and the total of the liability would have to be ascertained.

Hunt vs. Sharkey, 20 Cal. App. 690, 130 Pac.
21.

The doctrine that the unpaid portion of the subscribed capital stock of a corporation constitutes a trust fund for creditors is only available to judgment creditors and a mere stockholder cannot maintain an action to enforce collection of such unpaid portion on general allegations that the corporate assets are insufficient to pay creditors.

Merchants Agency vs. Davidson, 23 Cal. App.
274, 137 Pac. 1091.

Hospes vs. Northwestern Mfg. Co., 48 Minn.
197, 50 N. W. 1117.

Courtney vs. Georger, 143 C. C. A. 257, 228
Fed. 859.

Feehan vs. Kendrick, 32 Ida. 220, 179 Pac. 507.

Jensen vs. Aikman, 32 Ida. 261, 181 Pac. 525.

Participating or assenting stockholders are estopped to object to an issue of stock as fully paid when it was not so in fact.

5 Fletcher Cyc. Corps., p. 5913.

Cunningham vs. Holley etc. Co., 58 C. C. A. 140, 121 Fed. 720.

Re Charles Town Light & Water Power Co., 199 Fed. 846.

Washburn vs. Nat'l Wall Paper Co., 26 C. C. A. 312, 81 Fed. 17.

Green vs. Abietine Co., 96 Cal. 322, 31 Pac. 100.

Eggleston vs. Pantages, 93 Wash. 221, 160 Pac. 425.

Failure to object within a reasonable time is equivalent to express assent.

Taylor vs. Ry. Co., 13 Fed. 152.

Kent vs. Quicksilver M. Co., 78 N. Y. 159-191.

Transferees of such stock are bound as well as the original holder because stock certificates are not negotiable and pass subject to all equities.

5 Fletcher Cyc. Corporation, p. 5915.

Church vs. Citizens' St. R. Co., 78 Fed. 526.

Brown vs. Duluth etc. Ry. Co., 53 Fed. 889.

As this action would be barred under the Idaho Statute of Limitations, it was incumbent upon appel-

lant to excuse himself from the imputation of *laches* in his complaint, and having failed to do so, the bill does not state a cause of action.

Secs. 6607, 6610, I. C. S.

21 Corpus Juris 401.

Smith vs. Smith (C. C. A., 9th Circuit), 224 Fed. 21.

Kelly vs. Boettcher, 29 C. C. A. 14, 85 Fed. 55.

Newberry vs. Wilkinson, 118 C. C. A. 111, 199 Fed. 673.

Mackall vs. Casilear, 137 U. S. 556, 34 L. Ed. 776.

Wyman vs. Bowman, 62 C. C. A. 169, 127 Fed. 257.

Badger vs. Badger, 2 Wall. 95, 17 L. Ed. 338.

Richards vs. Mackall, 124 U. S. 183, 31 L. Ed. 396.

ARGUMENT

The Trial Court having ruled that the complaint did not state facts sufficient to constitute a cause of action, we must first consider what a cause of action is. In Matz vs. Chicago & A. R. Co., 85 Fed. 180, and on 187, the Court states:

“The Century Dictionary defines a cause of action to be ‘the situation or state of facts which entitles a party to sustain an action’.”

In Billing vs. Gilmer, 8 C. C. A. 645, 60 Fed. 332, and on page 334, it is stated:

“What is a cause of action? As defined by one of the learned counsel for appellee: ‘A cause

of action is the existence of those facts which give a party a right to judicial interference in his behalf’.”

In *Mercantile Trust & Dep. Co. vs. Roanoke etc. Co.*, 109 Fed. 3, and on page 8, the Court states:

“The ground or cause of action is of first importance, and this has been defined to be ‘the ground on which an action can be maintained’. Black, Law Dict., p. 182. ‘It is composed of the right of the plaintiff, and the obligation, debt, or wrong of the defendant. This combination, it is sufficiently accurate to say, constitutes the cause of action’.”

In *McAndrews vs. Chicago etc. Co.*, 89 C. C. A. 546, 162 Fed. 856, and on page 858, it is stated:

“The phrase ‘cause of action’ comprises every fact necessary to the right to the relief prayed for.”

In view of these authorities we submit that in order to state a cause of action appellant must allege the existence of a state of facts that will entitle him to the relief prayed for. He is suing according to his own allegation (Tr., p. 27) “in the name of and for the benefit of the corporation” (*Payette Valley Land and Orchard Company*) and he must not only show that the corporation would be entitled to such relief but also that he is entitled to such relief when suing for the benefit of the corporation. Certainly then, he cannot occupy any better position than the

corporation in whose name he professes to sue and which answered denying many of his material allegations, and he is bound by the same limitations and restrictions that would bind the corporation if it brought the action. We shall show later on in the brief that the doctrines of estoppel and laches will bar plaintiff, even though they might not operate to the same extent against the corporation, but we will first discuss the question whether the corporation would have a right of action upon either of the transactions complained of.

NO LIABILITY ON STOCK ISSUED FOR PROPERTY

We have quoted at length in the appendix the provisions of the Idaho constitution and statutes bearing upon stock and stockholders and will only refer to the most important of them here. Section 4728 of the Idaho Compiled Statutes, among other things, declares:

“No corporation shall issue any stock as paid up in whole or in part * * * except for money, property, labor or services actually received by the corporation.”

This clearly authorizes such corporation to issue its stock for property received.

Section 4752, Idaho Compiled Statutes, in subsection 9, declares:

“When a corporation shall issue stock or bonds for labor done, services performed or property actually received, the judgment of the

directors of such corporation as to the value of such labor, services or property shall, in the absence of fraud in the transaction, be conclusive.”

It is alleged in Paragraph VIII of the complaint (Tr., pp. 10 and 11) as follows:

“That on or about the 21st day of February, 1910, and in violation of said by-laws, 100 shares of stock in said defendant corporation of the par value of \$100.00 per share were issued by order of the directors of said corporation and a majority of the board of directors thereof, and without the knowledge or consent of plaintiff, to each of the following persons, to-wit: O. H. Avey, A. P. Scritchfield, M. F. Albert, J. W. Roberts, L. V. Patch, Otto C. Miller and R. E. Haynes, who at said time constituted the board of directors of said corporation, said stock being issued as fully paid up; that the issuance of each 100 shares purported to be in consideration of a one-seventh equity in certain land consisting of about 240 acres, situated in Canyon County, Idaho; that said defendants nor neither of them had any equity in said lands or any part thereof, except an option to purchase the same, which said option or interest was not of the value of said shares of stock so issued, to-wit: \$70,000 or any value at all to said corporation. That this plaintiff is reliably informed and *varily* believes and upon information and belief alleges the fact to be that there was no real or valuable

consideration for the issuance of said 700 shares of stock in said defendant corporation, and that no part of the face or par value of said stock has ever been paid, of all of which said directors had knowledge.”

It accordingly appears that this stock was issued after the board of directors had determined the value of the property, and for all that appears in the complaint, these directors at this time, which according to the allegations was before the corporation was actually organized, owned all the stock of the corporation, hence, the case presents the identical situation that was presented in the much litigated case of *Old Dominion Copper Company vs. Lewisohn*, 210 U. S. 206, 52 L. Ed. 1025, where the Court at page 1029 (210 U. S., page 212) said:

“At the time of the sale to the plaintiff, then, there was no wrong done to anyone. Bigelow, Lewisohn, and their syndicate were on both sides of the bargain, and they might issue to themselves as much stock in their corporation as they liked in exchange for their conveyance of their land. *Salomon vs. A. Salomon & Co.* (1897), A. C. 22; *Blum vs. Whitney*, 185 N. Y. 232, 77 N. E. 1159; *Tompkins vs. Sperry*, 96 Md. 560, 54 Atl. 254.”

This corporation having so issued its shares in the absence of any allegation of fraud in the transaction is prohibited from a recovery therefor in this action.

It is possible that under the allegations of the bill, appellee would be liable to creditors, as declared in said Section 4728, which provides:

“Each stockholder of a corporation is individually and personally liable for its debts and liabilities to the full amount unpaid upon the balance or face value of the stock or shares owned by him.

“Any creditor of the corporation may institute actions against any of its stockholders jointly or severally, and in such action the Court must determine the amount unpaid upon the stock held or owned by each defendant and a several judgment must be entered against him for a sum not exceeding such amount.”

However, no creditor is here complaining, but the plaintiff is seeking to recover on behalf of the corporation for its use and benefit. We contend that under the pleadings and law that this appellee corporation is without right of action on the facts alleged. Light is thrown on this question by a statement of this Court in the case of *Cunningham vs. Holley, Mason, Marks & Co.*, 58 C. C. A. 140, 121 Fed. 720, where on page 721 Justice Gilbert in discussing this question states:

“There is in Washington no statutory prohibition against the payment of stock subscriptions by the transfer of property to the corporation in the place of cash. * * * When stock is so paid for and property is so taken in pay-

ment, it is the general rule that the transaction cannot be impeached, even at the suit of a creditor of the corporation, except for fraud. 'Where full paid stock is issued for property received, there must be actual fraud in the transaction to enable creditors of the corporation to call the stockholders to account'."

And there is no pretense here of even an attempt to allege fraud in this transaction. The foregoing declaration of the rule of law as applicable here is emphasized by the statement of the Supreme Court of the United States in *Coit vs. North Carolina etc. Co.*, 119 U. S. 343, 30 L. Ed. 420.

As above shown the statute specifically gives a creditor of the corporation the right to institute an action against a stockholder for the difference between the par value and the amount paid by him, but does not give such right to the corporation itself in the absence of fraud on the corporation. The actual value of the stock alleged to have been issued for the property, so far as the allegations of the complaint are concerned, was purely nominal and so far as the allegations of the complaint show, the parties to whom such stock was issued were all the stockholders at that time unless by inference the plaintiff himself was then the holder of a portion of the 38 shares unaccounted for by the complaint; and this transaction, according to the allegations of the complaint, occurred about two months before the corporation itself was organized, in February, 1910,

or about eight years prior to filing the complaint, and the plaintiff has stood by all these years and made no objection or complaint until the filing of this action.

A statement made by the Court in the case of Walburn vs. Chenault, 43 Kan. 352, 23 Pac. 657, and on page 660, sheds some light on such a transaction:

“Although the amount of stock issued for the purchase of the property was large, it had only a nominal value, and it was delivered and treated by all parties as full paid. The fact that the property was overvalued will not, in the absence of fraud, create a liability against the stockholders.”

If that rule is correct as applied to the case at bar, then the plaintiff has not stated facts sufficient to constitute a cause of action so far as the transfer of such stock in consideration of such property was concerned.

While this rule might not apply so far as creditors were concerned, no creditor is here complaining. In Kirsch vs. Interstate Fisheries Co., 81 Pac. (Wash.) 855, and on page 856, it is stated:

“Whatever the rights of the creditors might be, as between the corporation and the subscribers, this stock was fully paid up, and the corporation will not be heard to gainsay it. The corporation lawfully became the owner of this stock, and had a right to sell or reissue it. Furthermore, after receiving the benefits of the sale of the stock, the defense of *ultra vires* is not available.”

This corporation received the benefit of this sale about eleven years ago and the charge of *ultra vires* according to the rule above mentioned cannot prevail. This contention is emphasized by a ruling of the Court in Eggleston vs. Pantages, 93 Wash. 221, 160 Pac. 425, where on page 428 the Court states:

“The doctrine that the capital stock of the corporation is a trust fund for the creditors and that all stock must be paid for in money or money’s worth * * * in the absence of fraud or misrepresentation, has no application as between the stockholders themselves where the rights of the creditors are not involved.”

In Inland Nursery & Floral Co. vs. Rice, 57 Wash. 67, 106 Pac. 499, and on page 500, the Court states:

“It is well established that a corporation issuing stock as fully paid by a transfer of property cannot thereafter treat it as partly paid; and, upon the same reasoning, it is held that, in the absence of actual fraud, a corporation cannot maintain an action to cancel shares of stock issued in exchange for property upon the ground that the property was not actually worth the valuation placed upon it. Iowa Drug Co. vs. Souers, 139 Iowa, 72, 117 N. W. 300, 19 L. R. A. (N. S.) 115, and cases cited in note. The appellant here, having placed its own valuation on the property at the time of the transfer for its stock, cannot now complain upon the ground of an overvaluation. ‘Whatever may have been

in fact the value of the property turned over to the company for its stock, the company agreed to take it for the stock. The persons interested were the stockholders, and there was no dissent on the part of any person concerned from what was then done. *Neither any person then holding stock nor any person who afterwards became a stockholder by assignment from one who then held stock can now make complaint on behalf of the corporation as against the fairness of that transaction.* This I take it to be the settled law on that subject'." (Our italics.)

Clinton M. & M. Co. vs. Jamison, 256 Fed. 577.

Northern Tr. Co. vs. Columbia etc Co., 75 Fed. 936.

There is a case somewhat similar reported in the 23d Federal—Foster vs. Seymour, page 65—where it appears that the statute as in the case at bar authorized the issue of shares as full paid for property, and on page 66 the Court states:

"The statute under which the company was incorporated authorizes the trustees to issue stock and exchange it for property, and declares that when exchanged such stock shall be taken to be full-paid stock, and not liable to further calls. * * * The statute, however, permits the trustees to exchange stock to the amount only of the value of the property for which it is exchanged. Upon these facts the corporation

has no right of action against the trustee. The corporation has lost nothing by the transaction disclosed by the bill, except the paper which was created and called capital stock. None of its capital was diverted. The scrip was not capital stock. The capital stock of a corporation is the money or property which is put into a corporate fund by those who subscribe for stock, and thereby agree to become members of the corporate body. Unless it represents capital contributed, or agreed to be paid in, it has no value.

* * * The property it received in exchange for the scrip had some value; certainly as much as the scrip had. There was no fraud upon the corporation. At the time the scrip was exchanged for the mining property, the trustees were all there was of the corporation. There were no stockholders unless they were stockholders. What was done was done by the corporation. * * * The remedy of complainant if he has been deceived into purchasing stock in this corporation by false representations as to its value is against those who have misled him. Even if he could recover against the corporation or against the trustees, the corporation has no cause of action against the trustees."

In the case last quoted from the suit was by a stockholder for the benefit of the corporation, hence the question of pleading was exactly the same as in the case at bar and a general demurrer to the bill was sustained.

In 14 *Corpus Juris*, Section 648, pages 458 and 459, the rule is thus laid down:

“In the absence of constitutional, statutory, or charter provisions to the contrary, an agreement by which a corporation issues stock for property, labor, or services, is binding, unless rescinded for frauds on the corporation and on the participating or consenting stockholders, irrespective of the actual value of the property, labor, or services, as compared with the par value of the stock, no rights of dissenting stockholders or creditors being involved; and it is held that the corporation and participating or assenting stockholders and their transferees are bound by the agreed fictitious valuation, even when there is a constitutional or statutory prohibition against a fictitious issue or increase of stock, or issue for less than par.” (Citing numerous cases.)

In *O’Dea vs. Hollywood C. Co.*, 145 Cal. 53, 97 Pac. 1, and on page 6, the Court states:

“Directors of a corporation have a right to issue stock as fully paid up, upon such terms and at such price as they see fit, and in the absence of fraud, as far as the stockholders or their assignees are concerned, the action of the directors in issuing it is final, and the action of the corporation cannot be attacked by the stockholders, or the validity of the issue assailed on the ground, merely, that the consideration was inadequate for which the corporation issued it

as fully paid up. Creditors may attack the transaction; stockholders cannot." (Citing cases.)

In the light of these authorities, how can it be possible that where, as here, no fraud is alleged and no creditor is complaining, the appellee corporation through a stockholder can now repudiate the action of its board of directors in valuing the property at \$70,000 and issuing fully paid stock of the par value of \$70,000 for such property and then recover the full par value of such stock, especially under a statute which says specifically that the judgment of the directors shall be conclusive in the absence of fraud? To ask this question is to answer it, and it necessarily follows that no cause of action could be stated by the corporation resting upon such facts, and that appellant suing in the right of the corporation stands in no better position and has not stated a cause of action upon the issuance of this 700 shares of stock for the property.

NO LIABILITY FOR STOCK ACQUIRED AT LESS THAN PAR

The second transaction complained of in the complaint is the alleged issuance of 116 shares of full paid stock to appellee Avey for one-fourth of their par value, which is alleged to have been done by order of the board of directors.

Section 4728 of the Idaho Compiled Statutes of 1919 contains the following provision in relation to this matter:

“Each stockholder of a corporation is individually and personally liable for its debts and liabilities to the full amount unpaid upon the par or face value of the stock or shares owned by him.

“Any creditor of the corporation may institute actions against any of its stockholders jointly or severally, and in such action the Court must determine the amount unpaid upon the stock held or owned by each defendant, and a several judgment must be entered against him for a sum not exceeding such amount.

“Nothing in this title must be construed to render any stockholder individually or personally liable, as such stockholder, for debts or liabilities of the corporation, either at the suit of a creditor or for assessments or calls, to an amount exceeding the balance unpaid upon his stock or the difference between the amount that has been actually paid upon his stock and the par or face value thereof, except when so liable on the ground of fraud or misrepresentation, or concealment, or for neglect or misconduct as an officer, agent, stockholder or member of the corporation.”

This statute merely recognizes a right generally accorded to corporate creditors who have exhausted their legal remedies against the corporation, but it does not give the corporation itself or a stockholder suing in its behalf power to repudiate its agreement that stock issued at less than par shall be fully paid.

The Supreme Court of Idaho has construed this statute in the recent case of *Feehan vs. Kendrick*, 179 Pac. 507, 32 Ida. 220, where after quoting the statute the Court says at page 223:

“By this statute no new liability of the stockholder is created, but an old one is recognized and made available to corporate creditors (citing cases).

“At common law a stockholder was, to the extent of the amount unpaid on his stock, liable for the corporate indebtedness (7 R. C. L., p. 356), such liability being enforced in equity either through the corporation, represented by an assignee or a receiver, or by the creditors individually. (*Holmes vs. Sherwood*, 16 Fed. 725.) By the provisions of the section last above quoted, a stockholder's liability, as at common law, is still for the corporate indebtedness only, and the extent thereof is still measured by the amount unpaid upon his stock.”

And on pages 225 and 226 the Court further states:

“When a subscription to capital stock is made and the stock is issued and not paid for in full, the corporation may place itself in position whereby it cannot recover further payments from the subscriber. However, its creditors may exact payment of any remaining balance upon the subscription in order that his debt due from it may be paid. This liability is recog-

nized at common law and by statute. The most that can be said for the statute is that it declares a well-settled and familiar principle of the common law which recognizes the contractual obligation the subscriber and his assignee, who has purchased stock with notice that it has not been paid for, owe to pay the subscription price, which obligation may be enforced by, or on behalf of, a creditor of the corporation."

This is an interpretation of this statute by the highest Court of the State. This shows that the plaintiff on behalf of the appellee corporation has not stated a cause of action in this respect, for there being no statute prohibiting appellee corporation from issuing its shares at less than par, and in the absence of fraud, having done so, it is conclusive against the corporation and does not give it a cause of action against the purchaser of such shares.

This being a question of the construction of an Idaho Statute, the Federal Courts should follow the doctrine announced by the highest Court of the State.

Cunningham vs. Holly, etc. Co., 58 C. C. A. 140, 121 Fed. 720.

Re Jassoy Company, 101 C. C. A. 641, 178 Fed. 515.

Courtney vs. Georger, 143 C. C. A. 257, 228 Fed. 859.

The general rule upon this question is in accordance with the doctrine of the Idaho Supreme Court,

as appears from 5 Fletcher Cyclopedia Corporations, page 5899, where it is stated:

“It is undoubtedly true, however, as was stated in a former section, that where a corporation issues watered or fictitiously paid up stock, with the consent of all the stockholders, and when there is no charter, statutory or constitutional provision rendering the transaction void, the agreement is valid and binding as against the corporation, and it cannot afterwards repudiate the same and exclude the holders of the stock, or compel them to pay the difference between the par value of the stock and what has been paid or agreed upon as full payment.”

Numerous cases from many jurisdictions are cited in support of this doctrine.

In *Scoville vs. Thayer*, 105 U. S. 143, 26 L. Ed. 968, and on page 973, the Court states:

“The stock held by the defendant in error was evidenced by certificates of full paid shares. It is conceded to have been the contract between him and the Company that he should never be called upon to pay any further assessments upon it. The same contract was made with all the other shareholders, and the fact was known to all. As between them and the Company this was a perfectly valid agreement. It was not forbidden by the charter of the Company or by any law or public policy, and as between the Company and its stockholders was just as bind-

ing as if it had been expressly authorized by the charter.

“If the Company, for the purpose of increasing its business, had called upon the stockholders to pay up that part of their stock which had been satisfied ‘by discount’, according to their contract, the stockholders could have successfully resisted such a demand. No suit could have been maintained by the Company to collect the unpaid stock for such a purpose. The shares were issued as fully paid, on a fair understanding, and that bound the Company.”

This declaration was approved in *Dickerman vs. Northern Trust Company*, 176 U. S. 181, 44 L. Ed. 423, and on 434, where the Court quotes the above declaration, and then on page 435, where the Court declares:

“There is no doubt that, if this were a suit by creditors to enforce payment of the unpaid portion of the stock subscription, the fact that the stock certificates declared that they were fully paid and unassessable would be no defense; but it is a suit of stockholders in the right of the corporation, and as between the corporation and its stockholders, the declaration that the shares are fully paid up and unassessable is a valid one.”

The decisions in the Wisconsin cases cited by appellant at page 22 of his brief were based partly on allegations of fraud and partly on different statutory

provisions, and as appears from the foregoing, unless distinguished upon this ground they are contrary to the general rule and should be disregarded, in view of the clear statement of the Idaho Supreme Court on the question.

In *re Jassoy Co.*, 101 C. C. A. 641, 178 Fed. 515, where it appears that the statute of New York was substantially like the Idaho statute above quoted, the holding of the New York Court in construing said statute is set forth on page 517 in the following words:

“The liability does not exist in favor of the corporation itself, nor for the benefit of all its creditors, but only in favor of such creditors as are within the prescribed conditions.”

And see *Courtney vs. Georger*, 221 Fed 502, where the Court, on page 505, quotes the ruling in the case of *In re Jassoy* above mentioned with approval. This case was affirmed on appeal, 143 C. C. A. 257, 228 Fed. 859.

See also *In re Huffman-Salvor Roofing Co.*, 234 Fed. 798.

The California Courts on constitutional provisions similar to those in Idaho have held clearly that neither the corporation nor its stockholders can assail stock issued as fully paid for less than the par value of the stock. See:

Smith vs. Martin, 135 Cal. 247, 67 Pac. 779.

California Trona Co. vs. Wilkinson, 20 Cal.

App. 694, 130 Pac. 190.

APPELLANT NOT ENTITLED TO RECOVER
ON SUBSCRIPTION OR TRUST FUND THEORY

The first point argued in appellant's brief is thus stated at page 14: "Under the Idaho statutes appellee Avey owed to the corporation in the nature of an express subscription the amount of the par value unpaid upon the stock issued to him." The second point, found at page 18, is: "Avey's acceptance of the stock raised an implied promise to pay the par value thereof."

The argument on these points is founded chiefly upon the Idaho statutes and is applied both to the stock issued for property and the stock alleged to have been issued at less than par, but the cases cited are either actions by creditors or by receivers representing creditors, or else are actions based on actual fraud, and none of them can have any application here. As we have shown above, the agreement of the corporation through its board of directors that the stock should be fully paid in the case of each of the transactions complained of was binding upon the corporation and stockholders suing in its right. But even if we accept appellant's theory that there is an express or implied subscription enforceable by the corporation to recover the balance unpaid, nevertheless the corporation could only enforce this liability by proceeding in accordance with Sections 4733-4751, inclusive, Idaho Compiled Statutes, quoted at length in the appendix, relating to assessments and calls. Section 4733, quoted by appellant, provides that the directors may levy and collect assessments "in the

manner and form, and to the extent, herein provided". The board would accordingly have to levy an assessment or call upon all the outstanding stock upon which any portion was unpaid in accordance with Sections 4733-4736, and would have to publish and mail notice of such assessment, as provided in Sections 4737 and 4738. It certainly could not single out one or two stockholders as appellant has done and charge them with the whole liability, allowing the others to escape scot-free, before the total amount required to be paid creditors was ascertained.

Hunt vs. Sharkey, 20 Cal. App. 690, 130 Pac. 21.

Besides, Section 4751 limits a personal action against a stockholder for calls by the corporation by providing that:

"On the day specified for declaring the stock delinquent or at any time subsequent thereto and before the sale, the board of directors may elect to waive further proceedings by sale, and may elect to proceed by action to recover the amount of the assessment and the costs and expenses already incurred, or any part thereof."

In Wall vs. Basin Mining Co., 16 Ida. 313, 101 Pac. 733, the Court points out that in the statute the words "assessment", "call" and "installment" are used interchangeably and holds that by issuing its stock as fully paid and non-assessable a corporation may debar itself from levying assessments. This case certainly cannot support appellant's position

here, but it does show that he is seeking to enforce a call in the right of the corporation, and that such corporation could not charge appellee with a personal liability until the conditions precedent contained in Sections 4733-4751 had been complied with. Accordingly, the assumption of appellant stated on page 18 that "it needs no argument to reach the one conclusion that the corporation is entitled to recover on this subscription" cannot be accepted at its face value.

At page 23 of appellant's brief a further proposition is advanced as follows:

"The capital of a corporation is a trust fund for creditors and stockholders and if some stockholders have not paid par value for the stock, the corporation as trustee may collect the unpaid part, particularly when the corporation requires such fund to continue business, pay creditors and prevent an assessment against the stock of an innocent stockholder."

This argument can lead nowhere in this case because appellant is not an innocent stockholder. As pointed out heretofore the bill does not allege that a single share of appellant's stock was actually paid for in full or that he is in any sense an innocent stockholder. He claims to own 304 shares of stock and by his own allegations there could not possibly be but 38 shares of the entire capital stock of the company that were not issued for twenty-five cents on the dollar or for property which he claims was

of no value. He does not allege that the remaining 38 shares were actually paid for in full or that he owns any portion of such shares. Besides if appellant was an innocent stockholder he would not be personally liable for calls and he would have ample opportunity to defend, if his stock was sought to be taken by assessment.

Feehan vs. Kendrick, 32 Ida. 220, 179 Pac. 507.

The trust fund doctrine relied upon by appellant has been upheld by the Courts for the purpose of protecting creditors, and even to that extent it has been severely criticised by many learned Courts. See:

Hospes vs. Northwestern Mfg. Co., 48 Minn. 197, 50 N. W. 1117.

Courtney vs. Georger, 143 C. C. A. 257, 228 Fed. 859.

Re Jassoy Co., 101 C. C. A. 641, 178 Fed. 515.

It is universally held, both at common law and under statutes similar to the Idaho statute, that a creditor, in order to enforce this doctrine, must first have reduced his claim to judgment and must have exhausted his legal remedies against the corporation. Thus in Merchants' etc. Agency vs. Davidson, 23 Cal. App. 274, 137 Pac. 1091 and on page 1092, it is stated:

"It seems to be the general rule that a creditor's claim must be reduced to judgment and execution thereon issued and returned unsatis-

fied before he can invoke the aid of equity in enforcing collection. Cook on Corporations, Sec. 200; Pomeroy's Eq. Jur., Sec. 1415. That one adopting such course has exhausted his legal remedies admits of no doubt."

In the Idaho cases in which creditors have attempted to enforce stockholders' liability on this or any theory they have first reduced their claims to judgment. See:

Feehan vs. Kendrick, 32 Ida. 220, 179 Pac. 507.

Jensen vs. Aikman, 32 Ida. 261, 181 Pac. 525.

This limitation on the doctrine is based upon the necessity that the claim should first be liquidated and that any defense the corporation may have must first be determined at law where there is a right to a jury trial. In order to sustain the complaint here the Court would have to hear proof upon and determine the validity of every claim against the company and the action being in equity, the corporation would be denied a jury trial on such question, while the creditors, not being before the Court, could not be heard at all.

We submit, however, that as the diligence of learned counsel for appellant has failed to discover a single case to justify the extension of this doctrine so as to allow a stockholder to recover because there is a possibility that creditors of the corporation will be unpaid, the Trial Court was justified in dismissing the bill for want of equity.

ESTOPPEL AND LACHES

In the discussion thus far we have assumed that appellant is in no worse position than the corporation would be if it brought the action. But in view of his own allegations, how can it be said that he is not estopped or that he is not prevented from maintaining this action by the equitable doctrine of laches and stale claims? His bill of complaint shows that he owns from 266 to 304 shares of stock issued under exactly the same circumstances as that of appellee, or in other words, that either appellant or his predecessors in ownership of the stock upon which he bases his right of action participated in the transactions complained of.

In 5 Fletcher Cyclopedia Corporations, at page 5913, the author states:

“When a corporation has issued its stock as full paid, without receiving its par value in money or property, the transaction cannot be assailed by stockholders who participated, consented or acquiesced. They are estopped. And a stockholder who does not object within a reasonable time, when he has knowledge of the transaction, will be deemed to have acquiesced, but the assent must not have been induced by fraud or have been on an unfulfilled condition.”

Numerous cases are cited in support of this text.

In *Cunningham vs. Holley, etc. Co.*, 58 C. C. A. 140, 121 Fed. 720, at page 721 the Court said:

“It is alleged in the answer, however, that the plaintiff in error was a party to the agree-

ment by which the property and money so subscribed were taken and accepted in full payment of all the capital stock and the shares were issued as paid up and non-assessable. A party to such an agreement cannot as against other stockholders with whom he agreed and contracted assert the invalidity of the transaction."

Other cases so holding are:

Re Charles Town L. & P. Co., 199 Fed. 846.

Washburn vs. National Wall Paper Co., 26

C. C. A. 312, 81 Fed. 17.

Green vs. Abietine Co., 96 Cal. 322, 31 Pac. 100.

Eggleston vs. Pantages, 93 Wash. 221, 160 Pac. 425.

In Taylor vs. South and North Alabama Ry Co., 13 Fed. 152, it was held that failure to object within a reasonable time amounted to consent and estopped the stockholders from afterwards raising the question that the stock was not fully paid for. See also Kent vs. Quicksilver Co., 78 N. Y. 159-191.

In the case at bar over eight years elapsed between the original transaction and the filing of this suit, and from three to six years between the second transaction and the filing of this suit. Hence, the presumption of assent would clearly seem to apply.

It is true that appellant alleges that these transactions both occurred without his knowledge or consent, but he does not show that he owned any specific amount of stock at the time which he still holds, or

that he has at the present time any stock which was not issued as a result of one or the other of these transactions. If he was not a stockholder at the time his knowledge or consent would be immaterial, and if, as we must assume the case to be upon the allegations of the bill, his 304 shares were transferred to him and the original holders of such stock participated in the transaction, appellant is clearly bound by the rule of estoppel.

In 5 Fletcher Encyclopedia Corporations, page 5915, the author states:

“A transferee of stock in a corporation occupies the same position as his transferrer with respect to the right to complain of an issue of watered or fictitiously paid up stock, and is therefore estopped to complain if his transferrer was estopped. This is true, whether he is a transferee of shares of the watered stock, or a transferee of shares of other stock, which was held by a participating or consenting stockholder; and it is true notwithstanding the fact that he purchased the stock in good faith and in ignorance of the fraudulent or unlawful issue.”

In *Church vs. Citizens Street Ry. Co.*, 78 Fed. 526, at page 530, the basis of this rule is well stated in the following language:

“It is further objected that the plaintiffs in this case, having become purchasers of the stock, although they were good-faith purchasers of it, took it and hold it by no better or different title

than the transferrer of it to them. It is clear that the shares of stock in a corporation are not governed by the law merchant, nor are they governed by the statute of this state touching bills of exchange and notes made payable in a bank in this state. * * * But stocks are mere choses in action, governed by the principles of the common law, and by the common law such choses in action are no better or higher evidence of title or right in the hands of an assignee than they were in the hands of the assignor. That is the general rule—a rule that, in my judgment, is applicable to this case—and, without a reference to the adjudications that have been read to the Court, the Court would have reached the same conclusion by the application of the general principles of law with which the members of the bar as well as the Court are familiar. So that in this case I see no principle of the law that would authorize the plaintiffs to maintain the present bill on the ground that the stock that they had purchased, by the transfer or assignment of it, had acquired some new rights or equities that the stock did not possess in the hands of the transferrer or assignor. And this view seems to be supported by the authorities that have been read, which are in harmony with the understanding that the Court has of the principles involved in this sort of contracts.”

See also: *Brown vs. Duluth etc. Ry. Co.*, 53 Fed. 889.

Regardless of the application of the rule of estoppel, appellant is prevented from maintaining this action by the doctrine of laches and stale claims. The bill shows on its face that the first transaction complained of occurred over eight years prior to filing suit and nearly eleven years before the hearing, while the second transaction, so far as appellee is concerned, occurred nearly six years before filing the suit and no excuse whatever is offered for the delay. The Idaho Statutes of Limitations which would apply if this were an action at law are as follows:

Sec. 6607. "The periods prescribed for the commencement of actions other than for the recovery of real property are as follows:

Sec. 6610. "Within four years: An action upon a contract, obligation or liability not founded upon an instrument or writing."

The other provisions of the statute are set forth at length in the appendix, but none of them would seem to apply to the present case. The action is certainly not founded upon a written instrument, and if Section 6610 does not apply, Section 6617, which also prescribes a four-year limitation, would control. The Idaho Supreme Court has held that Section 6630 of the Compiled Statutes, which was Section 4077 of the Revised Codes, does not apply to such an action. See *Feehan vs. Kendrick*, 32 Ida. 220, 179 Pac. 507.

This action, however, being an equity action, the Court will follow the prescribed Statute of Limita-

tions by analogy, and it appearing that the alleged cause of action would be barred under such statute, it is incumbent upon appellant to allege definitely the facts which justify or excuse his delay in instituting suit.

The rule on this subject as applied in the Federal Courts is thus stated in 21 Corpus Juris, page 401, as follows:

“Where on the face of the bill it appears that there has been unreasonable delay in instituting the suit so that apparently plaintiff has been guilty of laches, the bill must by specific averment account for and excuse the delay.”

In *Smith vs. Smith*, 224 Fed. 1, at page 6, this Court quotes with approval a decision from the Eighth Circuit and clearly lays down the rule which we think is applicable here, using the following language:

“While the Court below, sitting as a Court of Equity, was not bound by the state statute of limitations, it was proper for it to follow that statute, unless facts were shown which rendered its application inequitable. In *Kelley vs. Boettcher*, 85 Fed. 55, 62, 29 C. C. A. 14, Judge Sanborn said:

“The meaning of this rule is that, under ordinary circumstances, a suit in equity will not be stayed for laches before, and will be stayed after, the time fixed by the analogous statute of limitations at law; but if unusual conditions or extraordinary circumstances make

it inequitable to allow the prosecution of a suit after a briefer, or to forbid its maintenance after a longer, period than that fixed by statute, the chancellor will not be bound by the statute, but will determine the extraordinary case in accordance with the equities which condition it.

* * * When a suit is brought within the time fixed by the analogous statute, the burden is on the defendant to show, either from the face of the bill or by his answer, that extraordinary circumstances exist which require the application of the doctrine of laches; and, when such a suit is brought after the statutory time has elapsed, the burden is on the complainant to show, by suitable averments in his bill, that it would be inequitable to apply it to his case.'

"That doctrine has been applied in numerous cases. *Broatch vs. Boysen*, 175 Fed. 702, 99 C. C. A. 278; *Boynton vs. Haggart*, 120 Fed. 819, 57 C. C. A. 301; *Cunningham vs. Pettigrew*, 169 Fed. 335, 94 C. C. A. 457; and *Brun vs. Mann*, 151 Fed. 145, 80 C. C. A. 513, 12 L. R. A. (N. S.) 154."

See also:

Newberry vs. Wilkinson, 118 C. C. A. 111, 199 Fed. 673.

Mackall vs. Casilear, 137 U. S. 556, 34 L. Ed. 776.

Wyman vs. Bowman, 62 C. C. A. 169, 127 Fed. 257.

Badger vs. Badger, 2 Wall. 95, 17 L. Ed. 338.

Richards vs. Mackall, 124 U. S. 183, 31 L. Ed. 396.

While the precise date on which appellee Avey is claimed to have purchased stock at twenty-five cents on the dollar is not alleged, it does appear that 662 shares of stock were so sold between March, 1912, and September, 1915, and it cannot be presumed in support of the bill that appellee's stock was acquired less than four years before filing the suit in the summer of 1918. And accordingly the doctrine of laches was properly applied by the Trial Court and the action held to be barred.

In conclusion we call attention to the fact that the case of H. C. Anderson, appellant, vs. M. F. Albert, et al., appellees, No. 3613, presents exactly the same questions upon a practically identical record, and it has been stipulated that the decision in that case may follow the decision in this case. Accordingly, we submit that the judgment of dismissal in both cases should be affirmed.

Respectfully submitted,

RICHARDS & HAGA,

Solicitors for Appellee O. H. Avey.

APPENDIX

Sections of Idaho Compiled Statutes referred to in the above brief:

SEC. 4728. *Personal Liability of Stockholders.* Each stockholder of a corporation is individually and personally liable for its debts and liabilities to the full amount unpaid upon the par or face value of the stock or shares owned by him.

Any creditor of the corporation may institute actions against any of its stockholders jointly or severally, and in such action the Court must determine the amount unpaid upon the stock held or owned by each defendant, and a several judgment must be entered against him for a sum not exceeding such amount.

Nothing in this title must be construed to render any stockholder individually or personally liable, as such stockholder, for debts or liabilities of the corporation, either at the suit of a creditor or for assessments or calls, to an amount exceeding the balance unpaid upon his stock or the difference between the amount that has been actually paid upon his stock and the par or face value thereof, except when so liable on the ground of fraud or misrepresentation, or concealment, or for neglect or misconduct as an officer, agent, stockholder or member of the corporation.

No corporation shall issue any stock as paid up, in whole or in part, or credit any amount, assess-

ment or call as paid upon any of its stock, except for money, property, labor or services, actually received by the corporation, or actually paid upon the indebtedness of the corporation, as provided in this section, to the full value of the amounts credited upon such stock.

If any stockholder of any insolvent corporation pays the full amount unpaid upon the stock held by him as above defined, upon the overdue debts of the corporation, incurred while he was such stockholder, he is relieved from any further personal liability upon his stock, but not from any liability for fraud, neglect or misconduct. The liability of such stockholder is determined by the amount of stock or shares owned by him at the time the debt or liability was incurred by the corporation, and such liability is not released or discharged by any subsequent transfer of stock.

When such liability does not arise upon contract, it shall be deemed to be incurred when judgment thereof is obtained against the corporation.

The term "stockholders", as used in this section, applies not only to such person as appears by the books of the corporation to be such, but also to every equitable owner of stock, although the same appears on the books in the name of another; and also to every person who has advanced the instalments or purchase money, or subscribed for stock in the name of a minor, so long as the latter remains a minor; and also to every guardian or trustee who voluntarily invests any trust funds in the stock. Trust funds

in the hands of a guardian or trustee are not liable under the provisions of this section; by reason of any such investment, nor is the person for whose benefit such investment is made responsible in respect to the stock until he becomes competent and able to control the same; but the responsibility of the guardian or trustee making the investment continues until that period, or while the investment continues. Stock held as collateral security, or by a trustee who is not the beneficial owner, or in any other representative capacity without beneficial interest, does not make the holder thereof a stockholder within the meaning of this section, except in the cases above mentioned, so as to charge him with the debts or liabilities of the corporation; but the pledger or person or estate represented is to be deemed the stockholder as respects such liability.

Members of corporations not organized for profit and having no capital stock are not individually or personally liable for its debts or liabilities, unless such liability is imposed by the by-laws of the corporation, and then only to the extent so imposed; any such liability may be enforced to the extent imposed by the by-laws by joint or several actions against members, as before provided.

The liability of each stockholder of a corporation not formed under the laws of this state, but doing business within the state, is the same as the liability of stockholders or corporations organized under the laws of this state.

SEC. 4729. *Issuance of Certificates.* All corpora-

tions for profit must issue certificates for stock when fully paid up, signed by the president and secretary, or such other officers as may be authorized by the by-laws of the corporation, and all such corporations may provide in their by-laws for issuing certificates prior to the full payment, under such restrictions and for such purposes as their by-laws may provide.

SEC. 4733. *Directors May Levy Assessments.* The directors of any corporation formed or existing under the laws of this state, after one-fourth of its capital stock has been subscribed, may, for the purpose of paying expenses, conducting business or paying debts, levy and collect assessments upon the subscribed capital stock thereof, in the manner and form, and to the extent, herein provided.

SEC. 4734. *Limitation on Assessments.* No one assessment must exceed 10 per cent of the amount of the capital stock named in the articles of incorporation, except in the cases in this section otherwise provided as follows:

1. If the whole capital of a corporation has not been paid up, and the corporation is unable to meet its liabilities or to satisfy the claims of its creditors, the assessment may be for the full amount unpaid upon the capital stock; or if a less amount is sufficient, then it may be for such a percentage as will raise that amount.

2. The directors of railroad corporations may assess the capital stock in instalments of not more than 10 per centum per month, unless in the articles of incorporation it is otherwise provided.

3. The directors of fire insurance corporations may assess such a percentage of the capital stock as they deem proper.

SEC. 4735. *Same: Previous Uncollected Assessment.* No assessment must be levied while any portion of a previous one remains unpaid unless:

1. The power of the corporation has been exercised in accordance with the provisions of this title for the purpose of collecting such previous assessment.

2. The collection of the previous assessment has been enjoined, or

3. The assessment falls within the provisions of one of the subdivisions of the last preceding section.

SEC. 4736. *Order Levying Assessment.* The order levying an assessment must specify the amount thereof, when, to whom and where payable; fix the day subsequent to the full term of publication of the assessment notice, on which the unpaid assessments will be delinquent, not less than 30 or more than 60 days from the time of making the order levying the assessment; and a day for the sale of delinquent stock, not less than 15 nor more than 60 days from the day the stock is declared delinquent.

SEC. 4737. *Notice of Assessment.* Upon making of the order the secretary must cause to be published and mailed to each stockholder at his last known place of residence a notice thereof, in the following form:

(Name of corporation in full. Location of principal place of business.) Notice is hereby given that

at a meeting of the directors held on the (date), an assessment of (amount) per share was levied upon the capital stock of the corporation, payable (when, to whom and where). Any stock upon which this assessment remains unpaid on the (day fixed) will be delinquent and advertised for sale at public auction, and unless payment is made before, will be sold on the (day appointed) to pay the delinquent assessment, together with costs of advertising and expenses of sale. (Signature of secretary with location of office.)

SEC. 4738. *Same: Publication.* The notice must be published once a week, for four successive weeks, in some newspaper of general circulation published at the place designated in the articles of incorporation as the principal place of business, and also in some newspaper published in the county in which the works of the corporation are situated, if situated in a different county and a paper be published therein. If there be no newspaper published in the place designated as the principal place of business of the corporation, then the publication must be made in some other newspaper of the county, if there be one, and if there be none, then in a newspaper published at the capital of the state.

SEC. 4739. *Delinquent Notice.* If any portion of the assessment mentioned in the notice remains unpaid on the day specified therein for declaring the stock delinquent, the secretary must, unless otherwise ordered by the board of directors, cause to be published in the same papers in which the notice

heretofore provided for was published, a notice substantially in the following form:

(Name in full. Location of principal place of business.) Notice—There is delinquent upon the following described stock on account of assessment levied on the (date), (and assessments previous thereto, if any), the several amounts set opposite the names of the respective shareholders as follows: (Names, number of certificate, number of shares, amount.) And in accordance with law, so many shares of each parcel of such stock as may be necessary will be sold at the (particular place), on the (date), at (the hour) of such day, to pay delinquent assessments thereon, together with the cost of advertising and expenses of the sale. (Name of secretary, with location of office.)

SEC. 4740. *Same: Additional Requirements.* The notice must specify every certificate of stock, the number of shares it represents and the amount due thereon, except when certificates may not have been issued to parties entitled thereto, in which case the number of shares and amount due thereon must be stated.

SEC. 4741. *Same: Publication.* The notice, when published in a daily paper, must be published for 10 days, excluding Sundays and legal holidays, previous to the day of sale. When published in a weekly paper it must be published in each issue for two weeks previous to the day of sale. The first publication of all delinquent sales must be at least 15 days prior to the day of sale.

SEC. 4742. *Delinquent Stock May Be Sold.* By the publication of the notice the corporation acquires jurisdiction to sell and convey a perfect title to all of the stock described in the notice of sale, upon which any portion of the assessment or costs of advertising remains unpaid at the hour appointed for the sale, but must sell no more of such stock than is necessary to pay the assessment due and costs of advertising and sale.

SEC. 4743. *Conduct of Sale.* On the day, at the place, and at the time, appointed in the notice of sale, the secretary must, unless otherwise ordered by the board of directors, sell, or cause to be sold, at public auction to the highest bidder, for cash, so many shares of each parcel of the described stock as may be necessary to pay the assessment and charges thereon, according to the terms of sale; if payment is made before the time fixed for sale, the party paying is only required to pay the actual cost of advertising in addition to the assessment.

SEC. 4744. *Purchaser.* The person offering at such sale to pay the assessment and costs for the smallest number of shares or fraction of a share, is the highest bidder, and the stock purchased must be transferred to him on the stock books of the corporation on payment of the assessment and costs.

SEC. 4745. *Corporation May Purchase.* If at the sale of stock no bidder offers the amount of the assessment and costs and charges due, the same may be bid in and purchased by the corporation, through the secretary, president or any director thereof, at the

amount of the assessment, charges and costs due; and said amount must be credited as paid in full on the books of the corporation, and entry of the transfer of the stock to the corporation made. While the stock remains the property of the corporation it is not assessable, nor must any dividend be declared thereon, but all assessments and dividends must be apportioned upon the stock held by the stockholders of the corporation.

SEC. 4746. *Same: Effect of Purchase.* All purchases of its own stock made by any corporation, vest the legal title to the same in the corporation, and the stock so purchased is held subject to the control of the stockholders, who may make such disposition of the same as they deem fit, on vote of a majority of all the remaining shares: *Provided*, That when the by-laws so provided, the board of directors may allow a redemption of the stock so sold upon payment of the sum for which the same was sold, together with all subsequent assessments which may be due thereon, and interest on such sums from the time they were due. Whenever any portion of the capital stock of a corporation is held by the corporation, it shall not be voted, but a majority of the remaining shares is a majority of the stock for all purposes of election or voting.

SEC. 4747. *Postponement of Sale.* The dates fixed in any notice of assessment or notice of delinquent sale, published as aforesaid, may be extended from time to time for not more than 30 days, by order of the directors, entered on the records of the corpora-

tion; but no such order is effectual unless notice of such extension or postponement is appended to, and published with, the notice to which the order relates.

SEC. 4748. *Defective Proceedings.* No assessment is invalidated by a failure to make publication of the notices, nor by the non-performance of any act required in order to enforce the payment of the same; but in case of any substantial error or omission in the course of proceedings for collection, all previous proceedings, except the levying of assessment, are void, and publication must begin anew.

SEC. 4749. *Actions to Recover Stock Sold.* No action must be sustained to recover stock sold for delinquent assessments, upon the ground of irregularity in the assessment, irregularity or defect in the notice of sale or in its publication, or defect or irregularity in the sale, unless the party seeking to maintain such action first pays or tenders to the corporation, or the party holding the stock sold, the sum for which the same was sold, together with all subsequent assessments which may have been paid or may be due thereon, and interest on such sums from the time they were paid; and no such action must be sustained unless the same is commenced within six months after such sale was made.

SEC. 4750. *Proof of Publication.* The publication of notice required by this title may be proved by the affidavit of the printer, publisher, foreman or principal clerk of the newspaper in which the same was published; and the affidavit of the secretary or auctioneer is *prima facie* evidence of the time and

place of sale, of the quality and particular description of the stock sold, and to whom, and for what price, and of the fact of the purchase money being paid. Such affidavit must be filed in the office of the corporation, and copies of the same, certified by the secretary thereof, are *prima facie* evidence of the facts therein stated. Certificates of files and records of the corporation in his office, signed by the secretary, and under the seal of the corporation, are *prima facie* evidence of their contents.

SEC. 4751. *Collection of Call by Action.* On the day specified for declaring the stock delinquent, or at any time subsequent thereto, and before the sale, the board of directors may elect to waive further proceedings by sale, and may elect to proceed by action to recover the amount of the assessment and the costs and expenses already incurred, or any part or portion thereof.

SEC. 6607. *Limitation of Actions.* The periods prescribed for the commencement of actions other than for the recovery of real property are as follows.

SEC. 6609. *Action on Written Contract.* Within five years: An action upon any contract, obligation or liability founded upon an instrument in writing.

SEC. 6610. *Action on Oral Contract.* Within four years: An action upon a contract, obligation or liability not founded upon an instrument of writing.

SEC. 6611. *Statutory Liabilities, Trespass, Trover, Replevin and Fraud.* Within three years:

1. An action upon a liability created by statute, other than a penalty or forfeiture.

2. An action for trespass upon real property.

3. An action for taking, detaining or injuring any goods or chattels, including actions for the specific recovery of personal property.

4. An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.

SEC. 6617. *Actions for Other Relief.* An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued.

SEC. 6630. *Actions Against Directors and Stockholders.* This chapter does not affect actions against directors or stockholders of a corporation to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached, or the liability was created.

IN THE
United States
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vs.

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tion, *Appellees*.

Reply Brief of Appellant

*Upon Appeal from the District Court of the United
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STATEMENT

Pursuant to the permission granted by the Court at the oral argument of the cause this reply brief is filed by the appellant, having for its purpose rebutting briefly the answering argument of appellee O. H. Avey and answering that portion of appellee's brief which raised questions other than those considered by the appellant in his brief. Appellant will, therefore in this brief consider the points made by appellee in practically the same order in which they appear in his brief, and as they were considered somewhat by appellant's counsel on oral argument.

ARGUMENT

Appellee has directed some attention to mathematical computation through which he claims it is apparent that a portion at least of appellant's stock is of the issues complained of in the bill, but fails to call attention to the possible cancellation of certain of the shares of stock or that appellant may be an innocent transferee of shares and the holder of a portion of the shares to which no question is directed. It is of course clear that if appellee claims that appellant took with knowledge of the situation or consented or acquiesced therein he should plead such matters as a defense since they are not properly cognizable on this appeal, which concerns the construction of the bill only. Certainly there is no presumption that appellant is not an innocent holder of the stock, but rather, under the Idaho decisions, the presumption is that he is an innocent holder thereof and the burden is upon appellee to plead and prove otherwise.

“Possessors of certificates of stock are prima facie presumed to be bona fide holders and it is incumbent upon appellant to allege that respondent was not a holder in good faith without notice of the fraud charged.”

Feehan vs. Kendrick, 32 Idaho 220; 179 Pac. 507.

So, too, on oral argument, appellee's counsel contended that the case of Wall vs. Basin Mining Company, Ltd., 16 Idaho 313, 101 Pacific 733 (erron-

eously cited on page 19 of Appellant's brief as reported in 17 Idaho 317, 100 Pacific 753), and the case of *Feehan vs. Kendrick*, *supra*, contained the expressions of the Supreme Court of Idaho upon the construction of the principal section of the Idaho Compiled Statutes in question here, namely: Section 4728, but a cursory examination of these cases will indicate that the first of them merely passes upon the power of a corporation to assess (using the term "assess" in its strict sense) shares of stock concededly fully paid and not the power of a corporation to issue stock as fully paid when not in fact so paid or the liability of the stockholders who had not paid par value to the corporation itself for the balance; and that the second case was a creditors' suit involving principally the applicability of a particular section of the statute of limitations of the State of Idaho. Certainly it does not pass upon the fourth paragraph of Section 4728. (See Appellant's brief page 12.)

Turning now to the principal contentions of appellee, we first notice the contention that no question can be raised as to the exchange of property for stock because, it is claimed, the Board of Directors placed a valuation upon this property equal to the par value of the stock and their finding of value is conclusive under Section 4752, Subdivision 9, quoted in appellee's brief, pages 14-15.

The contention fails to consider or analyze the allegations of the bill which does not at any place allege a valuation on the part of the Board of Direc-

tors. It is merely alleged, in effect, that the stock was issued without crediting the true value upon it. That is to say, in violation of the fourth paragraph of Section 4728 and the by-laws of the company, the stock was credited as fully paid when in fact nothing was received except worthless options in the one case, and in the other case only \$25.00 in cash, when the par value was \$100.00. This crediting of the stock as fully paid when in fact nothing, or but \$25.00, was received is in itself a sufficient allegation of fraud within the meaning of the statute relied upon by the appellees.

“Gross or intentional over-valuation is in itself proof of fraud.”

Clinton Mining & Mineral Co. vs. Jamison,
256 Fed. 577-580 and cases cited.

14 C. J. section 1489, page 963; Section 648,
pages 459-460.

The result would be that the Directors and Avey, having full knowledge of the law and the lack of value of the property taken, must be deemed to have agreed that the full amount credited should be paid, particularly since the Idaho statute makes no formal requirement for subscription,

Fletcher Cyclopedia of Corporations, pages
1189-1192,

and of course the payment of \$25.00 per share was not sufficient to constitute a payment in full, no matter what the Board of Directors might attempt to find as to such payment or its value.

However, it is clear that any valuation of property taken which the Board of Directors might make within the terms of the statute making its finding conclusive, must have equaled the full par value of the stock exchanged in view of the requirement of paragraph 4 of section 4728 (see Appellant's Brief, p. 12), that only the amount actually received may be credited upon the stock; it follows that as here the stock was credited as fully paid, then the Board must have valued the property at par of the stock exchanged—\$70,000.00—to make its valuation conclusive, but this is not even appellees' contention, as clearly appears from his answer (which was inserted in the record for such aid as might be in it) wherein it is alleged (Record, page 18) that the stock issued was not of the value of \$70,000.00 and had no actual or market value whatever and that (Record, page 23) "none of said capital stock of said corporation has ever at any time been worth its par value nor more than the sum of \$25.00 per share, nor has it ever at any time had a market value"; hence immediately after the transfer of the property the stock was not worth over \$25.00 per share and consequently the property itself could not have been worth over 25 per cent of the par value of the stock for which it was exchanged. The appellant directly alleges that the property was without any value at all, as the directors knew, and this, as has hereinbefore been said, was a sufficient allegation of fraud under the statute relied upon by the appellees.

Such a credit amounted to an attempt to give special terms which were void in themselves and left the subscription a clear unconditional one for the full amount of the par value of the stock.

“A corporation clearly has no power to agree with subscribers upon special terms which are in violation of express charter, statutory or constitutional provisions. If it does so the special terms as a general rule are void, not only as against subsequent creditors but also as against the corporation itself and they cannot be set up either to defeat an action upon the subscription or as a foundation of an action against the corporation. This principle has frequently been applied to special agreements by which subscriptions are to be paid in part only * * * where the * * * general statutory * * * provisions require payment in full. * * *

“A corporation has no authority to accept subscriptions upon special terms when the terms are such as to constitute a fraud upon the other subscribers. In such a case, however, the subscription is not void. The fraudulent and unauthorized stipulations are void and the subscriber is liable upon his subscription as if no such stipulation had been inserted. It has been held, therefore, in many cases that any secret agreement between a subscriber for stock in a corporation and the corporation or its agent or promoters by which he is allowed to subscribe upon different terms than other subscribers,

since it is a fraud upon the latter, and any secret agreement by which he is to be released in whole or in part from liability upon his subscription, since it is a fraud both upon other subscribers and persons who afterwards become creditors of the corporation, is void and the subscription may be enforced by the corporation * * * as if no such agreement had been made.

“The reason for the rule insofar as it relates to the other subscribers is that each of the subscribers in making his subscription ‘may be supposed to be influenced by that of others and every subscription to be based upon the ground that the others are what upon their face they purport to be’.

“To hold that the invalid special terms make the entire contract void would be to give full effect to the fraud and thus release the subscriber and throw upon the other subscribers that part of the common burden which he held out to them he had assumed, while by holding that the secret agreement alone is void the contemplated fraud is defeated and justice is done to the other subscribers and no wrong is done to the parties to the contract of which either has reason to complain.”

Fletcher Cyclopedia of Corporations, Vol. 2,
pages 1315 to 1316, 1324 to 1329.

So at page 17 of Appellee's brief it is said:

"It is possible that under the allegations of the bill Appellee would be liable to creditors." and this, of course, could only be true in case there remained some part of the par value unpaid. No part of the par value would remain unpaid if the Directors had made a proper valuation and the statement of Appellee in his brief above quoted is significant in that it clearly indicates Appellee does not contend that the Board of Directors valued the property taken at the par value of the stock.

No attempt will herein be made to distinguish the several citations made by Appellee in his brief, but it is confidently asserted that such citations are distinguishable from the case under consideration upon one or more of the following consideration: First, that no statute existed in the state wherein the decision was rendered similar to the fourth paragraph of Section 4728 or to Section 4715 (set out at pages 10-12, Appellant's brief); second, that the stockholders with full knowledge acquiesced in the transaction; third, that the vendors and directors making the valuation or special agreement were different persons, so that the directors acted uninfluenced by personal interest; or, fourth, that the valuation was made in absolute good faith, fairly and clearly without any fraud or fraudulent intent.

NECESSITY FOR CALL AND JOINDER OF SIMILARLY SITUATED STOCKHOLDERS

Appellee in his brief attempts to make a point of the fact that the Board of Directors of this corpora-

tion made no call upon the stockholders for the amount unpaid upon the par value of stock issued to them and that all stockholders who are similarly situated have not been made defendants in this action. It would be a strange doctrine that would permit the Appellee to object that no call had been made when he and others in his situation are in sole control of the corporation as majority stockholders and directors, and, as is alleged in the bill, have not only refused to make a call, but have attempted, and will attempt, to assess the appellant. It is not surprising, therefore, that on oral argument no mention was made of this point by counsel for appellee. It does not appear from the pleadings that collection is to be enforced only against appellee and in any event there is no requirement that all stockholders be joined in an action to collect unpaid subscriptions, the liability for which is several. Nor is there any showing that other similar suits are not pending against other stockholders in like situation. It does appear that the object of collection of the amount due is to pay debts and carry on the business of the corporation and in such a case each stockholder is individually and severally liable for the amount unpaid by him.

A subscriber's liability is a debt to the corporation which it may collect "and the amount unpaid may be recovered by the corporation even though there are no corporate creditors." Where a corporation is adjudged insolvent and has ceased to be a going concern there can be collected only their pro rata share of

the amount necessary to pay creditors and wind up its affairs.

“But this rule has no application when a corporation is a going concern and it is sought to collect the unpaid subscriptions for the purpose of continuing it as such and to further its business and purposes.

“The liability of the subscribers is several and not joint.”

Fletcher Cyclopaedia of Corporations, Vol 2, page 1259.

Bergman vs. Evans, 158 Pac. 961 (Wash.).

The refusal to make a call is specifically alleged and under such circumstances no call is necessary.

Fletcher Cyclopaedia of Corporations, Vol 2, pages 1514, 1528.

And the specific point was raised in the case of Bergman vs. Evans, *supra*, under almost identical pleadings, and it was there held “that the suit in itself is equivalent to a notice of call and a Court of Equity has the power to make the call upon a proper showing such as we think has been made in this case.”

ESTOPPEL AND LACHES

It is not surprising that counsel for Appellee made no mention upon oral argument of estoppel and laches. The matter of estoppel is based upon the claimed knowledge of the Appellant as a stockholder, but there is nothing in the bill which indicates such

knowledge. On the contrary, it is affirmatively alleged that appellant was ignorant of the transactions and that they were without his consent. He is presumed to be an innocent and *bona fide* holder of the stock, as has hereinbefore been set out. Feehan vs. Kendrick, *supra*. And if Appellee claims an estoppel by reason of knowledge he should plead it as a defense and show that he has been prejudiced by the non-action of the appellant.

“The appellants also contend that respondent is estopped by his laches and conduct from urging this action. In support of this they maintain that with knowledge that the subscriptions had not been paid in, he participated with the other directors in borrowing money for the corporation and waited seven years before complaining that their failure to pay up was an injury to the company, but there is no showing that appellants have been in anywise prejudiced by the action of respondent or that a change of conditions has taken place during the period of delay. * * * Laches is not a bar to a stockholders’ action, if neither the defendants nor others have been thereby induced to act upon the matters complained of. * * * Nor is it a bar where the illegal acts continue to the date of the suit.”

Bergman v. Evans. *supra*.

Nor can it be contended that either the statute of limitations or a period analagous to it which might be designated a period of laches has run or com-

menced to run until the occasion for its enforcement has arisen. If the action be held to be founded upon the fraudulent act of the directors and stockholders (who were the same persons), then the statute of limitations would not begin to run until the fraud had been discovered. Under Section 6611, Idaho Compiled Statutes, "the cause of action in such case is not to be deemed to have accrued until the discovery by the aggrieved party of the fact constituting the fraud or mistake" and as the date of the discovery does not appear in the bill, it is a matter purely of defense on the part of the appellee and to be set forth specifically in his answer; but in any event, an action upon a subscription for the unpaid par value does not accrue until a call has been made for the unpaid par value or until the occasion having arisen for the necessity of the call a reasonable time has elapsed without the making of the call by the Board of Directors. It is contemplated by the Idaho Statutes, Section 4733, which is set out in full at page 13, Appellant's brief, that the call need not be made at any specific time but may be made whenever the occasion or necessity arises.

It is said in Fletcher's Cyclopedia of Corporations, Vol. 2, pages 1465-1469, that when a subscription is payable on call, then:

"the statute of limitations does not commence to run until a valid call or assessment is made and then runs against that call or assessment only.

"Until such call there is no obligation of the

stockholder to pay. It may never be made.” Until necessity arises “the duty of payment is only a reserve duty for possible contingencies and until they happen, either by calls by the corporation on the subscription or by the rights of creditors, there is no duty of the subscriber to pay, no right of action against him for non-payment, and no starting point for the statute of limitations. * * *

“According to the better opinion it is not necessary that calls be made within the period fixed by the statute for commencing actions on subscriptions.”

CONCLUSION

Appellant confidently asserts that the bill states a cause of action against the Appellees, under the allegations of which he is entitled to recover on behalf of the corporation the amount unpaid upon the par value of the stock of Appellee. So far as appears from the record, it cannot be successfully contended that the par value has been paid or that the statutes of Idaho and by-laws of the company did not require the full payment of the stock. That being the situation and under the peculiar equitable features of this case—the double dealing of Appellee as an individual seeking a profit and gain for himself with the corporation of which he was the executive head and one of the principal stockholders and a director—the Appellee must be held to a liability to the corporation as upon a subscription to pay the full par value

with a credit only for that which he has actually paid and the decision of the lower Court should be reversed so that the case may be presented upon its merits.

Respectfully submitted,

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APPELLANT'S PETITION FOR
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APPELLANT'S PETITION FOR
REHEARING

Comes now the appellant above named, by his counsel of record herein, and respectfully petitions this Honorable Court for a re-hearing herein on the following grounds:

I.

It does not appear from the decision of the Court herein that the Court has given effect to that part of Section 4728, Idaho Compiled Statutes, 1919, reading as follows:

“No corporation shall issue any stock as paid up in whole or in part, or credit any amount, assessment or call as paid upon any of its stock,

except for money, property, labor or services actually received by the corporation or actually paid upon the indebtedness of the corporation as provided in this section, to the full value of the amount credited upon such stock.”

so far as the same relates to the issuing to Respondent Avey as fully paid 116 shares of stock, each of the par value of \$100.00, for \$25.00 per share.

II.

The Court erred in holding, in effect, that under Section 4752, Idaho Compiled Statutes, 1919, the Board of Directors might issue and value said 116 shares at \$25.00 per share and credit the stock as fully paid, notwithstanding its par value was \$100.00 per share and notwithstanding the provisions of Section 4728 of said Compiled Statutes hereinbefore quoted, and notwithstanding that the power to value the thing received in exchange for shares is limited under Section 4752 to “labor done, services performed or property actually received” and not permitted as to money received.

III.

The Court erred in holding, in effect, that the provisions of Section 4752 were applicable to an issue of shares for money.

IV.

The Court erred in holding, in effect, that shares might be issued at less than par value, but credited as issued for full payment.

V.

The Court erred in holding, in effect, that the Board of Directors might under said Section 4752 value the property taken at less than the par value of the stock exchanged therefor, yet credit said shares as fully paid, notwithstanding the provisions of Section 4728, Compiled Statutes, hereinbefore quoted.

VI.

The Court erred in holding that neither the corporation, nor the complainant on behalf of the corporation could maintain this action.

VII.

The Court erred in holding that appellant participated in the transactions.

VIII.

The Court erred in holding that the "bill is absolutely bare of any allegation tending to show any fraud."

IX.

The Court erred in holding that the value of the property transferred for the original stock issued is indicated or shown by the separate purchases of stock made from two to five and one-half years later at one-fourth par value.

X.

The Court erred in holding that the course pursued was sanctioned by the Idaho Statute, either as to the issuance of shares for valueless property, or,

and particularly, as to the issuance of shares as fully paid for one-fourth the par value of such shares.

XI.

The Court erred in affirming the decree of the District Court.

The effect of the decision of this Court is to nullify and render meaningless the provisions of Section 4728, Idaho Compiled Statutes, 1919, reading:

“No corporation shall issue *any* stock *as paid up in whole* or in part, or credit *any* amount, assessment or sale *as paid* upon *any* of its stock, except *for money, property* * * * *actually* received by the corporation as provided in this section to the *full* value of the amount credited upon such stock.”

because it appears from the decision that a corporation may, apparently, issue shares as fully paid notwithstanding that the par value is \$100.00 and the amount actually received in money is but \$25.00.

While the Court seems first to consider the correct theory of this action, namely, an action upon a subscription stripped of void agreements relating to the crediting as fully paid stock paid for in part only, yet it abandons this theory and proceeds upon the theory that it is an action to set aside the valuation by the Board of Directors under Section 4752, of property (not money) taken in exchange for stock issued. Under the first theory the Court holds, and correctly,

“that a corporation has no power to agree with subscribers to its stock upon any terms that are in violation of its articles of incorporation or any constitutional or statutory provision,” but erroneously holds that there exists in the Idaho statutes no provision against crediting \$100.00 as paid upon stock, though but \$25.00 is actually received. In other words there is read into Section 4728 an exception which does not exist, i. e., there is excepted thereby, so must be the inference from the opinion, the issuance of stock for money, with the result that so long as stock is issued for *money*, any amount may be credited as paid—a credit binding on the corporation and its innocent, as well as the participating stockholders—whether such *amount of money* is received or not. Such surely is not the true interpretation of such statutory provision; surely it was not intended thereby that the respondent could, as in this case, buy \$11,600.00 par value of stock, and be credited, and the corporation and its stockholders held as having received \$11,600.00, when, in fact he paid, and the corporation actually received, but \$2,900.00.

Either the Court has so held, or it has overlooked that transaction, wholly separate from the transaction for the sale of stock for property, and occurring from two to five and one-half years thereafter. The Court evidently overlooked the fact that the bill sets up two entirely distinct transactions of which complaint is made, (1) the sale of 100 shares in exchange for valueless property and (2) the sale of

116 shares, years later, in exchange for money in value one-fourth that of the par value of the stock; and has applied to the second sale, rules and statutes applicable solely to the first, namely, that the Board of Directors may under Section 4752 value such \$25.00 at \$100.00 (since, having issued the shares as fully paid the valuation must have been equal to par—the amount credited as having been actually received under Section 4728) and such valuation cannot be impeached except by showing actual fraud in arriving thereat. The bare statement sufficiently argues the inapplicability of said Section 4752, which applies solely to the valuation of labor, services or property other than money, to such a state of facts. It follows that whatever the Court might conclude as to the sufficiency of the showing of fraud with respect to the valuation of the property taken in the first sale, could not be conclusive with respect to the sale for money, which requires separate consideration not shown by the opinion to have been given.

Section 4728 was enacted for some purpose, and with intent that it be applicable to common as well as preferred stock—it appears to be clear, definite and unambiguous; it is not modified or nullified by Section 4752, except that in arriving at the amount to be credited the valuation by the Board of Directors of labor, services or property (other than money, of which there can necessarily be no determination of value) actually received is conclusive in the absence of fraud, yet the opinion compels the conclusion either that the Court considers said Section 4728

without effect and that said Section does not prevent the acknowledgment of receipt of par though not in fact received, nor constitute any limitation on the issuance of common stock, and that the Board might value money at a value different from its face value.

We think it true that under such section, and specifically under Section 4729, the corporation may issue shares of common stock prior to full payment, but it cannot issue such shares as fully paid, nor credit the purchase with full payment *unless and until the payment of the full par value is actually received by the corporation in money, labor, services or property.*

The case of Cunningham v. Holley, Mason, Marks & Co., et al., 121 Fed. 720, cited in the Court's opinion does not throw light upon the application of Section 4728, since it did not involve a similar statute, but is cited by the Court apparently on the matter of the conclusiveness of the valuation of the property involved in the first transaction, and particularly the right of a participating stockholder to question such valuations. It is not in point in this action for the reason that it nowhere appears herein that the appellant participated or acquiesced in, or had any knowledge of, the disposal of the stock concerning which complaint is made. In that case the Court refers to the complainant as "one of the incorporators *who participated in such agreement * * *.*" "A party to such agreement, cannot, as against other stockholders *with whom he agreed and contracted.*" Such the appellant was not, and to so hold is beyond

the bounds of proper inference (*Feehan v. Kendrick*, 32 Idaho 224, 179 Pac. 507) and in direct contradiction of the specific allegation of the bill wherein it is alleged that the sales were "without the knowledge and consent of plaintiff" (Paragraph VIII of Bill; Record, pp. 10, 11, 12) and even if appellant could not question the valuation of the property by the Board of Directors without a showing of actual fraud and no such showing appears in the bill, yet neither such decision, or such state of facts, would prevent an action by him on behalf of the corporation to recover unpaid balances of the subscriptions for 116 shares of the stock sold at \$25.00 each in money where, necessarily, no valuation of the money was or could have been, made by the Board.

As to the latter the rule announced by the opening paragraph of the opinion, that

"It is, of course, clear that a corporation has no power to agree with subscribers to its stock upon any terms that are in violation of its articles of incorporation or of any constitutional or statutory provision,"

is applicable, and the corporation may sue for the balance of the par value of the stock issued as on a full subscription stripped of the agreement to receive less than par.

" * * * the special terms are as a general rule void, * * * as against the corporation itself and they cannot be set up * * * to defeat an action upon the subscription. * * *

This principle has frequently been applied to

special agreements by which subscriptions are to be paid in part only * * * where the * * * general statutory * * * provisions require payment in full * * *."

"* * * In such a case, however, the subscription is not void. The fraudulent and *unauthorized* stipulations are void and *the subscriber is liable upon his subscription as if no such stipulation had been inserted.* * * * The subscription may be enforced by the corporation * * * as if no such agreement had been made."

Fletcher Cyclopaedia of Corporations, Vol. 2,
pp. 1315-1316, 1324-1329.

Appellant's Reply Brief, pp. 8, 9.

But there is sufficient allegation of fraud in the valuation of the property by the Board of Directors, and the Court is in error, we contend, in holding that "the bill is absolutely bare of any allegation tending to show any fraud on the part of the appellee Avey, or on the part of any of the other directors of the company." The bill avers:

"Said option or interest was not of the value of said shares of stock so issued, to-wit, \$70,000.00 or any value at all to said corporation * * * there was no real or valuable consideration for the issuance of said 700 shares of stock in said defendant corporation, and that no part of the face or par value of said stock has ever been paid, *of all of which said directors had knowledge.*"

And it also appears from the bill that such shares were issued by the directors *to themselves*. (Record, pp. 10, 11, 12; Bill, paragraph VIII.) True the word "fraud" is not used, but in the light of such allegation and of Section 4728, requiring a credit of only the amount actually received, and the admission of non-value contained in appellee's answer, which may be considered in this proceeding in aid of the bill (see Appellant's Reply Brief, pp. 5-7) and the rule that

"Gross or intentional over-valuation is in itself proof of fraud."

Clinton Min. etc. Co. v. Jameson, 256 Fed. 577; 580 and cases cited.

14 Corpus Juris, section 1489, p. 963, Section 648, pp. 459-469.

it was unnecessary to use such word, since the facts showing gross and intentional overvaluation upon proof of which a finding of fraud follows, are alleged.

21 Cyc. 396.

The Court, however, holds the allegation that the option was of no value to be unfounded because, the Court says, there is an express allegation in the bill "that the same directors paid in cash one-fourth of the par value of 662 of the shares of the stock of the company, obviously for a working capital." We frankly confess that we are unable to follow the court's reasoning. The 662 shares of stock were purchased over a period of three and one-half years,

the first purchase being made over two years after the purchase in which the option was exchanged for stock, and these 662 shares were themselves sold and purchased in violation of Section 4728 as hereinbefore set out. How is it possible to say that the consideration given in entirely separate transactions for shares not involved in or connected with the property transfer, save that they were shares in the same corporation and purchased by the same persons, indicates the value of the property transferred two to five and one-half years previously? How can the \$25.00 per share paid in 1915 for the share, for instance, numbered 1000, be held to indicate the value transferred in 1910 for share numbered 1?

Perhaps, and this is the only basis for the holding that we can conceive, the Court deemed the 662 shares to be worth \$25.00 per share by reason of the value of the property secured in the previous transaction and infers that the property not only was of the value of \$70,000.00, the par value of the stock for which it was given, but of sufficient additional value to constitute assets upon which to issue additional shares with a value of their own; yet this cannot be, for the Court holds that the \$25.00 per share was paid in as "working capital," and as such would have no value, necessarily, by reason of other assets. And how, from anything that appears in the record, could the court determine that such property gave value to the later shares, or the consideration for the later shares gave value to the property? It might be that the corporation had, meanwhile, acquired

other properties or assets, or contemplated other activities which gave value to the later shares, or other motives or designs, as numerous as the mind can conceive, impelled the purchase by these directors. Is it to be the conclusion of this Court that one who procures an overvaluation of the property which he conveys to a corporation for its stock, can escape liability for the difference between the true value and the par value of the stock for which he thus subscribes, merely by later purchases for less than par of stock of the same corporation credited as fully paid? And that such act will be deemed proof of proper and adequate valuation of the property first conveyed? We do not believe such to be the law, nor that this Court will retain its position upon a reconsideration of this cause.

It is doubtless true that the course of issuing stock without full payment obtains in all parts of the country, as the Court says, and that the decisions of Courts sanction such practice *where there are no statutory, or other binding, prohibitions*. And so it may be issued in Idaho, under Idaho statute, *but not as fully paid stock* since under Idaho statute the obligation of the subscriber to pay the balance of the par value remains subject to enforcement whenever, as in this case, the necessity arises.

Section 4728, 4729, 4733, 4751, Compiled Statutes, 1919.

Fletcher Cyclopedia of Corporations, Vol. 2, p. 1468.

The cases cited by the Court at conclusion of its opinion are not in point in this action. That of Old Dominion Copper Company vs. Lewisohn, 210 U. S. 206, 212, called for the application of no provision of law such as is found in the Idaho statutes (Sec. 4728) and it further appears that all stockholders were fully advised of the transaction. It is to be noted that the Court in that case observes,

“If there had been innocent members at the time of the sale, the fact that there were also guilty ones would not prevent a recovery.”

and under the allegations of the bill and the decision of the Supreme Court of Idaho hereinbefore cited, appellant must be regarded as an innocent member.

The case of *Cort v. Gold Amalgamating Co.*, 119 U. S. 343, involved the question of fraudulent over-valuation. It was therein alleged that the property conveyed for stock was of no market or actual value. The Court says that if actual fraud were proved and plaintiff gave credit to the company from a belief that the stock was fully paid there would undoubtedly be substantial ground for the relief asked, and that

“A gross and obvious over-valuation would be strong evidence of fraud.”

The question did not arise on an objection to the sufficiency of the bill, but upon appeal after trial, and it appeared from the evidence not only that the valuation was in good faith, but that it was proper. No statute such as Section 4728 was involved.

In *Northern Trust Co. v. Columbia Straw-Paper Company*, 75 Fed. 936, it appears that the valuation was proper. All stockholders were fully advised of and acquiesced in the transaction and the action was against innocent third purchasers of the stock. The case was appealed to the Circuit Court of Appeals (80 Fed. 450) and on Writ of Certiorari to that Court went to the Supreme Court of the United States (*Dickerman v. Northern Trust Co.* 176 U. S. 181) which made a point of the fact that the transaction,

“was not forbidden by the charter, or by any law or public policy.”

In *Clinton M. & M. Co. v. Jamieson*, 256 Fed. 577, it appeared that the valuation was proper and made in good faith; also that the stock sold was stock originally issued for full value and donated by the original holder to the corporation to sell as it pleased. No statute similar to Section 4728 was involved. The Court says of the matter of valuation:

“Is always impeachable for fraud, and gross or intentional over-valuation is itself proof of fraud * * *. There is little if any distinction in the cases between actual fraud and fraudulent intent in over-valuation. * * *”

“* * * We are concerned with their value to the corporation. * * *

“* * * The question of value must be determined upon facts as they existed when the transaction was consummated, not by subsequent events. * * *”

The latter observation is valuable in this action since apparently this Court determines the value of the property transferred by long subsequent purchases of other stock.

Of *O'Dea v. Hollywood Cemetery Assn.*, 97 Pac. 1, 6, it is sufficient to point out that the Court's holding that stock may be issued as fully paid up, though in fact less than par is paid, results from a lack of a statute in California similar to the Idaho statute in this case, which requires full payment upon stock issued as fully paid. It is to be noted that the California Court holds that calls may be made upon partially paid stock.

So in *Inland Nursery & Floral Co. v. Rice*, 57 Wash., 67, 106 Pac. 499, it does not appear that any such statute was involved, nor was there actual fraud in the valuation, which was not made, as in this case, exclusively by those who benefited by the valuation. Nor did any injury result to other stockholders, while in this action an attempt is being made to levy an assessment upon appellant's stock.

In conclusion we again direct the Court's attention to the fact that two transactions, separate and distinct and in some respects calling for the application of distinct principles and statutes are here involved. Even if it should be finally determined that no cause of action is stated, as to the matter of valuation of property exchanged for the stock first issued, though we firmly believe the facts and allegations are sufficient in that respect, yet there can be no question but that the subsequent sales of stock

were clearly contrary to the express statutory provisions, and that appellant is entitled, if the facts alleged be proved, to recover, for the corporation, the difference between the \$25.00 per share paid in fact and the \$100.00 par value credited thereon.

Respectfully submitted,

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Solicitors for Appellant.

I, SAM S. GRIFFIN, one of the counsel for the petitioner, do hereby certify that I have carefully read the foregoing petition for re-hearing, that in my judgment the same is well founded, and that it is not interposed for delay.

SAM S. GRIFFIN.

Service of the foregoing Petition for Re-hearing acknowledged this.....day of May, 1921.

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Solicitors for Appellee.

